In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1903.

NO. 1264.

NO. 10 SPECIAL CALENDAR.

THE UNITED STATES ex rel RIVERSIDE OIL COMPANY, Appellant,

v.

ETHAN A. HITCHCOCK, Appellee.

BRIEF FOR APPELLANT.

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Statement of the Case.

This is an appeal from a judgment of the court below dismissing a petition for mandamus against the Secretary of the Interior.

The answer challenged none of the allegations of fact in the petition and the case, upon the admitted facts, presented the pure question of the sufficiency in law of the reasons set up in the answer as justification for the defendant's attempted rejection of certain selections of land made by the petitioner's predecessor in title and denial of patent for same, and was heard in the court upon demurrer to the defendant's answer.

Though the record appears very voluminous the material facts may be very briefly stated.

The case arises under the legislation creating and governing national forest reserves. The policy of maintaining these reserves having been inaugurated about the year 1891, by an act authorizing their establishment by proclamation of the President, it soon became apparent that it would be essential for the government to regain possession and control of lands within the limits reserved, the title to which had or might have passed from the government or which were or might be in the possession of settlers and, as a substitute for condemnation proceedings, the act of June 4, 1897 (30 Stat., 36), contained the following provision:

> "That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of *vacant land open to settlement* not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, that in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

Under this act, one C. W. Clarke, the petitioner's predecessor in title (who will hereinafter be referred to as the selector), being the owner of certain land within the limits of a forest reserve and desiring to accept the offer of exchange contained in the act of 1897, and being

officially informed by the local officers that the land now in question was vacant land open to settlement, relinquished his said lands to the United States and selected, in lieu thereof, the lands for which patent is now sought, evidencing the same by filing in the local land office on December 14, 1899, written declarations thereof, copies of which appear in the record as Exhibits E and F, (R., 20, 22). The local land officers thereupon on behalf of the United States accepted the said relinquishments and declarations of selection and the register appended to the latter certificates that the land selected was free from conflict and that there was no adverse filing, entry, or claim thereto (R., 25, 26) made the proper entry upon their records and on January 21 and 22, 1900, forwarded the cases to the Commissioner of the General Land Office accompanied by letters certifying that the records of their office "show the lands selected to be free from conflict and subject to such selection." (Petn. Par., 11, R., 10).

After the cases had gone to the General Land Office for patenting, and pending action thereon, certain protests were filed against the selections which the petitioner moved to dismiss as being insufficient in form and substance, and ineffectual to interrupt the progress of the cases to patent.

The Commissioner of the General Land Office thereupon on December 18, 1900, rendered a decision in the matter holding that title to the selected lands could not vest until approval by him, that the lands were still open to exploration under the mining laws, and if at the date of his decision the lands could be shown to be mineral in character, it would defeat the selections, and directed the local officers to notify the selector that he would be allowed thirty days within which to apply for a hearing as to the then known character of the land,

one year after selection. This action being clearly erroneous, as was afterward held by the defendant in the similar case of the Kern Oil Co., *vs.* Clotfelter (30 L. D., 583), an appeal to the defendant was taken on behalf of the selector (R., 72) and the question presented was the propriety of the action taken by the Commissioner and his authority to take any action other than to pass the selections to patent. Whereupon the defendant, vacated the action of the Commissioner, but arbitrarily and unlawfully attempted to reject the said selections because of an alleged defect, which will be noticed later, and upon motion for rehearing and review, adhered to such action and directed the rejection and cancellation of the selections.

Thereupon the petition was filed in the court below praying that the writ of mandamus should issue to the defendant, commanding him to recall and vacate his order rejecting the said selections, reinstate the proceedings relating thereto, proceed therein as required by law, and order the same passed to patent.

We contend that the statute is plain and refers to the records of the Land Department for determination of the character of land subject to selection, that the exchanges in question were effected and the right to patent to the selected lands vested *eo instanti* upon the filing and acceptance of the relinquishments and declarations aforesaid, and that the subsequent proceedings in the Land Department were illegal and void.

Those subsequent proceedings, however, were recited in the petition and the full record set out in the exhibits therewith, so as to show the manner in which the case came before the defendant and the grounds upon which he attempted to reject the selections and refuse patent, but inasmuch as the grounds of his action are now to be

taken from his answer herein, it is only necessary to consider that answer, and the exhibits, though occupying a large portion of the record, have only a historical bearing on the case.

The defendant, in his answer, likewise recites these historical matters, and, in paragraph 10, sets up his defense in the following language, viz:

> "10. And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the *duty is imposed upon him to construe* the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties imposed, he was required to construe and apply the terms of the Act of Congress of June 4th, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term 'vacant land open to settlement' *to exclude land in the actual occupation of any person or persons under the local customs or rules of miners* which said customs and rules are by statute incorporated into and become part of the laws of the United States; that the Commissioner of the General Land Office under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of laws relating to public lands; that in the exercise of this authority, it became and was his duty to make regulations to carry into execution the act of June 4th, 1897, for the selection of lands in

lieu of lands included within the limits of the public forest reservation; that in pursuance of such duty he did under the direction of the Secretary of the Interior, by a form approved by the Secretary on May 9th, 1899, make and establish a regulation for the execution of said law which said regulation required that there should be submitted with the application to select an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke; that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner in a proper proceeding for that purpose passed upon and decided the right of the said selector Clarke to the land so selected, and that on appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands including mines, this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected: wherefore it became and was unlawful for this respondent, as such Secretary, or for the Commissioner of the General Land Office acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded."

The form approved May 9, 1899, referred to, is set out in Par. 8 of the petition (R., 7) and the portion relied upon by the defendant is also set out in Par. 2 of the answer (R., 122) as follows:

> "There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form had not been printed in any publication issued by the Land Department (See 28 L. D., 521, 523) and it is alleged in the petition (Par. 17, R. 14) and admitted by the answer that, contrary to the custom of the Land Department where affidavits are required, no form of non-occupancy affidavit had ever been adopted or furnished by the Land Department, that previous to May 4, 1898, the department had prescribed no form for selection under the act of 1897 or required any affidavit and, after the issuance of the instructions of May 4, 1898, treated the recital of the filing of a non-occupancy affidavit as merely directory and not mandatory and patented dozens of such selections in which no non-occupancy affidavit had been required or furnished.

It is also alleged in the petition (Par. 9, R. 9) and admitted by the answer that, at the time of selection, the lands in question had been by the Surveyor General returned as agricultural and were shown on the books and records of the Land Department as and being agricultural, not reserved or otherwise closed to settlement, that there was upon such records no filing, entry, or claim to the same, that there had been no discovery of mineral therein and no mineral was known to exist therein, and that the complete title to the same was in the United States and the United States were the sole and exclusive possessors and occupiers thereof as part of the vacant public land open to settlement; and (Petn., Par. 23, R. 17) that

there was no one present on the land at the time of selection and no claim to said land adverse to the selector then existed.

It also appears (Pet'n, par. 21, R., 16) that after the point of alleged lack of non-occupancy affidavit was raised by the defendant, the petitioner filed supplemental affidavits alleging specifically that the selected lands were unoccupied at the date of selection, copies of which appear in the record as Exhibits W and X (R., 103, 104), and the petition alleges, and it is admitted by the answer, that said affidavits were and are true in fact and that they were ignored by the defendant in his final action in the case.

It thus appears that at the time of selection the land was non-mineral, wholly unoccupied in fact, and admittedly subject to selection, even under the defendant's attempted construction of the act, and that the sole ground of the defendant's refusal of the patent is the alleged failure to file at the time of selection a so-called non-occupancy affidavit, which he attempts to justify upon the plea that in the exercise of his uncontrollable discretion he has construed the term vacant in the act to mean unoccupied, and, by a mere recital in an unpublished form, established a regulation making the filing of such affidavit a condition precedent to the operation of the statute.

It is also alleged in the petition (par. 22, R., 16) and admitted by the answer, that the defendant ordered oral argument of the motion for review of his first decision before the Assistant Attorney-General for his department, who, at such hearing, refused to hear any argument upon the question of the authority of the defendant to prescribe such non-occupancy affidavit and required the argument to proceed upon the assumption that the defendant had by proper and lawful regulation prescribed

such affidavit as a condition of selection under the act of 1897.

Assignment of Error.

The court below erred—

First. In overruling the petitioner's demurrer to the dafendant's answer.

Second. In holding the defendant's answer to be a sufficient defense to the petition.

Third. In not sustaining the petitioner's demurrer to the defendant's answer.

Fourth. In not granting the writ of mandamus as prayed in the petition.

Fifth. In not rendering final judgment against the defendant and commanding him to pass the selections in question to patent.

Sixth. In dismissing the petition.

Argument.

The sole ground of defense pleaded by the defendant cannot be sustained, even under his attempted construction of the act of 1897, and will be disposed of from that standpoint, but we deem it proper, first, to present our contention with respect to the act and its operation.

I.

THE EFFECT AND OPERATION OF THE ACT OF 1897.

The section of the act of 1897 here involved is a standing offer by the government to exchange vacant land open to settlement for land within the limits of forest reserves, which, when accepted by relinquishment and selection, becomes a binding contract and *eo instanti* vests the title to the selected land in the selector.

The selector is entitled to a patent in exchange for his relinquishment and, in contemplation of law, his patent issues to him immediately although, in practice, it is delayed in the routine of preparation, execution, recording and delivery.

As said by the defendant in exparte McDonald (30 Land decisions, 124):

> "By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired."

and in Clarke *v.* Northern Pacific R. R. Co. (ibid, 145, 148):

> "If the lands selected by Clarke were subject to selection at the time he made selection thereof and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were therefore not subject to the said withdrawal, having

been previously appropriated and segregated from the other public lands in the said township by such selections."

See Lessieur *v.* Price, 12 How., 59, 74.
Rector *v.* Ashley, 6 Wall, 142, 150.

Applying the rules of law governing contracts, by which the Government is bound as well as individuals (U. S. *v.* Tingey, 5 Pet., 114), it will be seen that in the transaction contemplated by the statute are two elements—first, the contract of exchange, and, second, performance of that contract. The contract is created by tender of the relinquishment and declaration of selection by way of acceptance of the Government's standing offer. And the contract is performed by surrender of the relinquishment on the one side and the delivery of the patent on the other.

The selector's right to patent is secured by tender of the relinquishment and declaration of selection, provided title to the base land be good, the relinquishment effective and the land selected of the class prescribed in the act. But, while the selector secures his right to patent by tender of his relinquishment and selection, he cannot be required to actually surrender his relinquishment and thus part with his title unless at the same time he receives from the Government a patent, or its equivalent, for the land he selects.

In an exchange each party is vendor and vendee, and the titles to the respective parcels of land pass and vest in the respective parties at the same instant of time (Bixby *v.* Bent., 59 Cal., 522; Bishop on Contracts, sec. 79) and the selector is entitled to know by the official act of the register and receiver that the Government accepts the relinquishment of his land as payment for the land

he selects and to know that he is purchasing land and not a law-suit or precarious claim against the Government (Arndt *v.* Griggs, 134 U. S., 325), and this official act is the acceptance of the relinquishment and selection and making the entry upon the record as required by the act.

The act provides that this entry of the selection of record and the issuance of the patent shall be without cost to the selector and the government, in its proposition to exchange lands with the selector, obligates itself to see that he is put on the selected land with the same security of title under which he held his forest reserve land. Good title to one piece of land is the sole consideration for the other, and each vendor guarantees his title to the other.

The function of the Register and Receiver.

Registers and receivers are nominated by the President and confirmed by the Senate in the same manner as judges of the courts and, as evident from the solemnity of their appointment, are officers of high degree. They are the custodians of the official land records and perform all executive duties with respect to sales and entries of the public lands.

By the recent act of Jan. 28, 1898 (22 Stat.,224) Congress has confirmed their authority as previously judicially defined, by amending R. S. 2234, so as to read as follows:

> "There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver of public moneys for each land district established by law, *who shall have charge of and attend to the sale of public and Indian lands within their respective dis-*

> *tricts*, as provided by law and official regulations, and receivers shall be accountable under their official bonds for the proceeds of such sales, and for all fees, commissions, or other moneys received by them under any provision of law or official regulation."

This statute is significant in view of the recognized diversity in the relations of administrative officers.

> "It will be found, on a careful examination, too extensive and minute to be entered upon here that the general relation between them, of superior and inferior, is varied by the most diverse provisions, so that in respect to some bureaus the connection with the department seems almost clearical, and one of mere obedience to direction, while in others the action of the officer, although a subordinate, is entirely independent, and, so far as executive control is concerned, conclusive and irreversible."
>
> Butterworth *v.* Hoe, 112 U. S. 56.

The local officers are by statute expressly charged with the duty of furnishing official information as to the public lands.

R. S., 2239 provides that the register for any consolidated land district shall be entitled to charge additional fees for making transcripts or furnishing *any other record information respecting public lands or land titles in his district.* R. S., 2247 provides a penalty upon the register for knowingly and falsely informing an applicant that the land sought had already been entered. And by the act of March 3, 1883, (22 Stat., 484) it is provided;

> "Sec. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts *showing what*

> *lands are vacant and what lands are taken.* * * and said officers shall, upon application by the proper State or Territorial authorities, furnish for the purpose of taxation, a list of all lands *sold* in their respective districts."

And on the first page of the General Circular of Instructions, as issued by the Land Department for many years, is the following notice to the public :

> "Any proper information regarding *vacant public lands* may be obtained by application at any of the land offices, a list of which will be found on page ——."

And in the same circular (likewise the Coal Land Circular) it has been said : (See Gen. Cir., 1899, p. 6).

> "If the tract is *vacant* and subject to the entry applied for, the register will so certify to the receiver."

So that, both by statute and departmental notice, the public is referred to the local officers for official information as to whether land is vacant and open to settlement or entry.

The act of 1897 prescribes no form for evidencing the selector's acceptance of the Government's offer, and, applying the rules of contract and satisfying the requirements of the statute of frauds, it will be seen that the elements of the writing to be presented to the local officers with the relinquishment are merely a description of the base land, a description of the selected land, a declaration of intention to make the exchange and the signature of the selector. This also conforms to the requirements of R. S. 2355, which provides :

> "Every person making application at any of the land offices of the United States for the purchase at private sale of a tract of land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half quarter-section, or quarter quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office."

and which may be presumed to have been in contemplation of Congress for, as is said in Commonwealth *v.* Clark (14 Gray, 372) per Bigelow, J.:

> "The distinction between a 'sale' and an 'exchange' is rather one of shadow than of substance. In both cases the title is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration is money or a commodity" (or other land).

It will also be observed that in the act of 1897, there is no requirement of any proof on the part of the selector.

In such case proof can be demanded only when the legal rules of contract and evidence require it. This was laid down by Attorney General Butler, 3 Op., Att'y. Gen., 126 [1836], early in the administration of the public land laws.

Under the rules of contract and evidence, while the right to patent is secured by tender of the relinquishment and selection, yet, in order to enforce that right, either in the Land Department or the courts, it may be admitted that the selector can be required to show his ownership of the base land, not, however, as a condition precedent of the right to patent, but merely as a condition

of enforcing it. The selector, however, in the case at bar, admittedly complied with every requirement of the department in this respect and the title to the base land is unquestioned.

On the other hand, with respect to the selected land, as we have shown, the selector is referred to the local officers, who are required by law and official departmental instructions to inform him if the land is vacant and open to settlement; but, aside from this, under the rules of contract and evidence, an owner of land is presumed to know all about his own land and needs no information from the other party to enable him to protect himself in the trade.

And in the case at bar, as alleged in the petition and admitted by the answer, the selector, before surrendering his title, was officially informed by the local officers that the land in question was vacant land open to settlement; and the local officers accepted and filed the papers tendered by the selector, entered the selection upon the land records, appended their certificate that the land was subject to selection and forwarded the papers to the General Land Office for patenting.

Such a final certificate or receipt is the equivalent of a patent and vests the equitable title in the purchaser, entryman, or selector pending delivery of patent, subject only to

The Supervisory Power of the Land Department.

Supervisory power implies that the official act to be supervised is done by an officer upon whom the duty of doing it is conferred. It is not power to deal with the subject originally or unlimited power to set aside what has been done by the officer charged with the duty of do-

ing it. The supervisory power of the Commissioner of the General Land Office and the Secretary of the Interior over the action of the local officers (which may be admitted for the sake of the argument) is limited to vacating such action for causes which in law make the patent void or, in equity, would sustain suit to cancel it.

These principles have been established by numerous decisions of the Supreme Court.

As said in Cornelius *v.* Kessel, 128 U. S., 456, (1888):

> "The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, undoubtedly authorizes him to correct and annul entries of land allowed by them, where the lands are not subject to entry, or the parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the Land Department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. *But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.*"

And the italicized portion of this excerpt is repeated in Brown *v.* Hitchcock, 173 U. S., 473 (1899.)

The Remedy.

It being admitted that the land was subject to selection at the time of selection and there being no suggestion of fraud in the transaction, the exchange was effected, the selector secured a vested interest in the selected land and right to patent therefor, there was no room for exercise of supervisory power and the land passed out of the jurisdiction of the Land Department.

> "It is the general rule in respect to the sales of real estate that when a purchaser has paid the full purchase price, his equitable rights are complete and there is nothing left in the vendor but the naked legal title which he holds in trust for the purchaser, and this general rule of real estate law has been repeatedly applied by this Court to the administration of the affairs of the Land Department of the government; and the ruling has been uniform, that when in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party in whom is vested all the rights and obligations of ownership."
>
> Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S., 128.

In such case mandamus will lie to compel the issuance of patent.

> "Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. *The execution and delivery*

of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty."

Barney *v.* Dolph, 97 U. S., 652, 656.
Simmons *v.* Wagner, 101 U. S., 260, 261.
Dibble *v.* Land Co., 163 U. S., 63, 74.

II.

THE DEFENDANT'S CONTENTION.

The defendant admits that the selection was perfection all respects except the filing of a non-occupancy affidavit, which alleged omission he claims to be a fatal and incurable defect, constituting a non-compliance with law within the rule laid down in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*, and attempts to justify this contention by the plea that, in the exercise of what he claims to be uncontrollable discretion, he construed the term "vacant" in the act to mean "unoccupied," and, under the sanction of that substituted term, made an alleged regulation requiring, as a condition precedent of the operation of the law, an affidavit showing the land to be unoccupied, and that the selector had not complied with that requirement.

The mere statement of this contention, involving, as it does, *the requirement of proof of an admitted fact*, stamps his action as an unlawful and arbitrary attempt to destroy the selector's title, and presents a clear case for relief by mandamus, under the general doctrine that the court will by mandamus relieve against arbitrary action.

But, in order to fully present the case, we will dispose of the elements of the defendant's contention separately.

He contends that he has exercised an official discretion that is uncontrollable, but we submit that

The Supervisory Power of the Defendant is Purely Ministerial.

As we have shown, his supervisory power is limited to interposing when the patent, if issued, would be void at law or, if valid at law, voidable in equity.

His duty is the merely ministerial one of examining the record of selection and directing the issuance of patent unless one of the two conditions mentioned exist. He must either perform the ministerial act of directing patent to be prepared for signature or refuse to perform it.

There is no judicial question before him for determination.

Judicial power presupposes the existence of some cause or controversy set forth in some complaint or accusation against an opposing party appealing to judicial principles and submitted for decision in some customary form of judicial procedure, and authority in the tribunal to finally determine the matter.

The action of the defendant is admittedly not a final disposition of the matter, for if he pass a case to patent such action would not be binding on the United States or any one claiming under them ; and his action in refusing patent is likewise subject to review by the courts. All of the cases hold that the determination of questions of law by the land department is not binding on the courts As said, for instance, in N. P. R. R. Co. *vs.* Colburn, 164. U. S., 383, where the Secretary of the Interior had (under the erroneous theory pervading its entire administration of the land laws and still invoked by him in the case at bar) held that occupation and cultivation exempted land from a grant :

> "Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts."

And where, in a suit by the government to cancel a patent, it was contended that in issuing the patent the Secretary had acted judicially and that his action was therefore, final, the Court says:

> "It is no doubt true that the actual character of the land was as well known at the Department of the Interior as it was any where else and that the Secretary approved the lists, not because he was mistaken about the facts but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the state; but this does not alter the case. The list was certified without authority of law and, therefore, by a mistake against which relief in equity may be afforded. As was said in United States *v.* Stone, 2 Wall, 535: '*The patent is but evidence of a grant and the officer who issues it acts ministerially and not judicially.* If he issues a patent for land reserved from sale by law, such patent is void for want of authority.'"
>
> Mullan *v.* The U. S., 271.

And in Orchard *v.* Alexander, 157, U. S., 373, it is said that passing upon homestead proofs is not a judicial, but purely ministerial, act.

Nor is there here any question of executive discretion.

Executive discretion, with which the judiciary cannot interfere, also presupposes a matter of purely executive or political nature entrusted to the judgment of an executive officer whose action is final.

"Rights under our system of law and proceedure do not rest in the discretionary authority of any officer, judicial or otherwise."

per Field, J., in Ex parte Parker, 131 U. S., 221, 225.

Administrative or ministerial action is executive power in process of execution. Executive power is spontaneous official power arising out of the law itself.

The following analysis of executive and judicial functions, in Lewis on the Government of Dependencies, pages 6 to 8, is right to the point:

> "Every executive act pre-supposes a prior legislative act which is carried into execution."
>
> "A judicial proceeding is a declaration by a competent authority, after preliminary complaint and inquiry, that a person has or has not brought himself within the terms of a certain penal enactment or that he has or has not a certain legal right or obligation which another disputes with him."
>
> "An administrative proceeding is for the purpose of carrying the law into effect, where there is no question about the legal culpability or dispute about a legal right or obligation of a person. In an administrative proceeding, the Government functionary acts or may act spontaneously. In a judicial proceeding he does not act until he is set in motion by an accusation or plaint addressed to

him. Thus, the power of a visitor of a college in an English University or of a Charitable Foundation which may be exercised at his own pleasure and without any complaint being preferred to him, is to this extent administrative and not judicial. Moreover, in order to found a judicial proceeding it is necessary not only that an accusation or plaint should be addressed to the judge, but also that the party who is accused or complained of, should have an opportunity of defending himself against such accusation or plaint."

"Whereas an administrative proceeding may take place without the necessity of allowing any such opportunity of extenuation to the person whom it may effect. Hence, the term administrative may be properly confined in accordance with the ordinary usage, to executive acts not judicial. In judicature proper, there is no administration, no management, as there is in finance, public works, government lands, relief of poor, etc. Indeed, all acts voluntary, as opposed to contentions jurisdiction, are properly administrative. On the other hand, judicial decisions are sometimes made by public officers whose ordinary functions are administrative. For example, the decisions imposing fines and forfeitures, made by the Revenue Board of this country."

There is apparent confusion touching the nature of the power exercised by the Secretary of the Interior in disposing of a given piece of public land.

The Constitution vests primary jurisdiction over the sale of public land, in Congress. Congress has made the Interior Department in some cases, its agent to sell its land and in other cases has granted land directly to grantees named in the grant, over the head of the Interior Department, without consulting it in any manner whatever. Congress is under no obligation to consult

the Interior Department in respect of the sale of its lands under any circumstances. Congress has, however, provided by particular statutes for progressive methods depending upon the acts of individuals, for the disposition of its lands to private persons and, in these progressive proceedings for the acquisition of public lands has seen fit to give the Secretary of the Interior supervisory power over the legal method prescribed by such specific statutes.

But there is no general system for disposing of all lands, nor is there a judicial or discretionary element necessarily involved in the sale of any piece of public land. The nature of the transaction here does not contemplate discretion. A trade does not involve what is known in law as discretion. Congress may dispose of the public land through private agencies clothed with no official power whatever. It may give private commissions for the sale of its public lands, as it does for the sale of its bonds. There is no greater judicial quality or discretion in swapping a piece of public land under the law of June 4, 1897, than there is in swapping horses at common law.

There being nothing in the nature of the transaction which is judicial or discretionary, there is nothing in the administration of the law under which the exchange is accomplished which is either judicial or discretionary.

The law says to the owner of the forest reserve land, "Relinquish it, and select vacant land open to settlement in lieu of it." The statute of January 27, 1898, says that registers and receivers shall take charge of and attend to the sale of public land. The statute of March 3, 1883, declares that receivers and registers shall make plats or diagrams showing the vacant lands in their districts, when asked so to do. All the elements, therefore, of an exchange of land under the statute of June 4, 1897,

are statutory elements. The statute of June 4, 1897, provides for the trade and fixes the kind and quantity of and to be exchanged. The statute of January 27, 1898, names the officers who shall have charge of and attend to the sale of the public lands. The statute of March 3, 1883, declares where a list of the lands offered for exchange may be had and what shall be evidence that land is vacant. No officer of the Interior Department has discretion to change or alter or modify any of these elements or statutory conclusions.

Mere intellectual activity in transacting a given piece of business, or in swapping things, is not the exercise of judicial power, nor of discretion, in the legal sense. In the exchange involved here no form of such power could be exercised.

It is entirely *ex parte*, administrative or ministerial, from begining to end. It is one of the simplest transactions known to the law, the exchange of one piece of property for another, which exchange by law is complete in all its parts at the same instant of time, and which under the law of contracts calls for guaranty of title by each vendor to the other.

Wherever the government enters into a transaction of any kind, it is governed by the *principles of law* which apply to similar transactions between individuals and as said in Bishop on Contracts, section 422:

> "The supreme rule is that the interpreter shall inform himself of the legal doctrines connected with the subject of the particular contract and with the rules for the interpretations of contracts; then in applying the rules, that he shall suffer those adapted to influence the question to exert, each what his judgment teaches to be its proper force, and all so to co-operate together, with the precedence

> of the one over the other, which he deems to be due in the particular instance, as to work out the result which best satisfies his understanding."

The following language used in the late case of Maese *v.* Herman (183 U. S. 572, 581) is significant of the purely ministerial function of the Secretary of the Interior in issuing patents for land:

> "Nor do we think the capacity of the town to take a patent is open to dispute in the Land Office. Of that capacity Congress was satisfied, *and it is not for the Land Department to conceive and urge doubts about it raised upon disputable legal propositions.* The town and its inhabitants were certainly substantial entities in fact, and were recognized by Congress as having rights, and directed such rights to be authenticated by a patent of the United States. *It is the duty of the Land Office to issue that patent to give the town and its inhabitants the benefit of that authentication, and to remit all controveries about it to other tribunals and proceedings.* It will be observed from this view that the question in the case is narrower than appellants conceive it. It is not what rights they had before confirmation of the grant, nor what rights they may assert under or against the patent, but what Congress has done, and what it has directed the Land Department to do. It is strictly this and nothing more, and on this only we express an opinion."

The defendant's duty is mandatory to direct patent to issue if no objection to the validity of the contract exists. He has here been commanded to show cause why he does not perform that duty and has set up the defence that the patent, if issued, would be void or voidable because of non-compliance with an alleged regulation. Is he to be both executive and judiciary? Can he say, as the executive, that he refuses to perform a ministerial act for certain

reasons and then sit as the judiciary and determine that those reasons are valid and preclude an inquiry by the courts in whom all judicial power is vested by the constitution?

Can he set up an erroneous conception of the statute as a defense to the performance of a ministerial duty imposed upon him by the true intent and meaning of the statute? Can he, the servant of Congress, be thus permitted to thwart the intention of Congress?

The Scope of Mandamus.

As we shall show later, there is no room for construction of the statute involved here, and we could safely rest upon that proposition; but in the recent cases of American School of Magnetic Healing *v.* McAnnulty, in the Supreme Court, and Payne *v.* U. S. *ex rel.* Nat. R'y Pub. Co., in this court (30 W. L. R., 790), the sound doctrine that mandamus will lie wherever a right is denied through mistake of law on the part of a ministerial officer, has been confirmed.

In our system of government neither legislative nor judicial power can be conferred upon an executive officer. The function of the executive is to enforce the law as enacted by Congress, that is, *according to its true intent and meaning.* Only that true intent and meaning is law and the function of determining that true intent and meaning is vested solely in the judiciary. If an executive officer misconceive a statute, whether its meaning be clear or not, and act accordingly, he is not administering the *law*, but a creation of his own brain which is *not* the *law;* and if the true intent and meaning of the statute, which is the law, require the performance of the duty which he refuses to perform under the sanction of what he mistakenly sets up as law, mandamus should, and will, lie.

The language of the Supreme Court in the American School of Magnetic Healing case is unmistakable. They say :

> "That the conduct of the Post Office is a part of the administrative department of the Government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved *by any action* by the head or one of the subordinate officials of that department *which is unauthorized by the statute* under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.*"

> "Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, *must depend upon some law of Congress, and if no such law exist, then he can not exclude or refuse to deliver them.* Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occured, based upon evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that *if the evidence* before the Postmaster General, *in any view of the facts, failed to show a violation of any Federal Law*, the determination of that official that such violation existed would not be the determination of a question of fact, *but a pure mistake of law* on his part, *because the facts being conceded, whether they amount to a violation of the statutes, would be a legal question* and not a question of fact. Being *a question of law simply*, and the case stated in the bill being

outside the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order."

The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is *a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief.* Otherwise, the invividual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

"Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts) and, therefore, it was his duty upon complaint being made to decide the question of law whether the case stated was within the statute yet *such a decision being a legal error does not bind the courts.*"

And this is the tenor and effect of the language of the Supreme Court and of the Court of Appeals, as well, in Roberts *vs.* Valentine. The Supreme Court says:

"Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a par-

> ticular act by virtue of a particular statute this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must, therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, *upon the facts existing, he is bound to perform*, then that act is ministerial, although depending upon a statute which requires in some degree a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

And it is to be observed that the italicised sentence in the following language of the Court of Appeals:

> "The duty which is sought to be enforced by mandamus must be purely ministerial and existent at the time. The duty of the officer must be plainly defined and one that he is required by law

> to perform. In our opinion these requirements are completely satisfied by the conditions of this case. *The statute conferring the right and imposing the duty is so plain in its terms as to admit of no room for construction.*"

is not used as a limitation of the doctrine of mandamus but merely as a statement of the fact or condition presented in that case.

Under this sound doctrine of mandamus, the facts being admitted, the court must apply the the law to those facts irrespective of any tenderness towards the defendant's official position.

The defendant next contends that the term vacant in the statute means unoccupied, but **it is not permissible to import into a statute a word not found there.**

> Newhall *v.* Sanger, 92 U. S., 761, 765.
> Leavenworth, etc. R. R, Co. *v.* U. S., 92 U. S., 733, 751.
> Morrill *v.* Jones, 106 U. S., 466.
> Payne *v.* U. S. ex rel Nat. Ry. Pub. Co., 30 Wash. L. R., 791.

As said by Paterson. J., in Rex *v.* Burrell (12 Ad. & El., 468), such a mode of transportation only gives occasion to endless difficulty and this is particularly pertinent here because the term "vacant land" has a definite legal meaning involving record evidence only, while the term "unoccupied" is indefinite, as we shall show presently, and in abandoning the certainty of the record for fugitive and uncertain testimony of occupation, the defendant ignores the sound and comprehensive doctrine of the Supreme Court.

In Tarpey *vs.* Madsen, (178 U. S., 215, 221) they say:

> "A proper interpretation of the acts of Congress making railroad grants like the one in ques-

> tion requires that the relative rights of the company and an individual entryman must be determined, not by the act of the company, in itself fixing definitely the line of its road, *nor by the mere occupancy of the individual, but by record evidence*, on the one part the filing of the map in the office of the Secretary of the Interior, and on the other, the declaration, or entry, in the Local Land Office. *In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given the rights of each*, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by the fugitive and uncertain testimony of occupation."

Such being the rule with respect to gratuitous grants, it applies with greater force to a statutory exchange of lands between the government and an individual where the latter is required to relinquish his title to the United States and is guaranteed the recording of the exchange and issuing of patent without cost to him. Unless he gets title according to the record he is subject to the danger of his fugitive and uncertain testimony of occupation and has traded his secure title for an insecure one. (Arndt *v.* Griggs, *supra*).

It is of the very essence of a real estate title that it be in writing. (Bishop on Cont., 1327.)

It has long been settled by the Supreme Court that mere occupation and improvement give no vested right in the public land as against the United States and consequently not as against a purchaser from them.

Sparks *v.* Pierce, 115 U. S., 408.
Yosemite Valley Case, 15 Wall, 86.
Frisbie *v.* Whitney, 9 Wall. 187.

And, as we show later, whenever Congress has deemed it proper to protect occupants or settlers it has used apt language for the purpose. And it is to be remarked that settlers may file their claim of record before entering on the land, and if they do not, they assume the risk of other disposition by the government.

If "unoccupied" could be held to be the equivalent of "vacant," then "unoccupied" must also be inserted in place of "vacant" in the act of 1883, *supra*, and it is then the duty of the register to give official information as to what lands are unoccupied and what taken, and, as the action of the register under the act of 1883 is spontaneous and consists merely in certifying the condition of the land records, it is still plain that no oral proof is required and nothing is gained by the defendant's attempt to tamper with the statute.

But aside from these considerations—

III.

THE STATUTE IS PLAIN AND LEAVES NO ROOM FOR CONSTRUCTION.

This question and others which will be considered are really academic, because it is admitted by the pleadings that the land selected was at the time of selection "vacant land open to settlement" even under the defendant's attempted construction of those terms, but as these questions are presented in the record incidentally and are involved in other cases pending in the Land Department, we deem it prudent to notice them briefly.

The defendant himself had previously declared that the Act was too plain to admit of construction.

On April 14, 1899, in the case of Hyde (28 L. D., 284) he said:

> "*This language is so clear and explicit as to leave no room for construction.* Vacant land open to settlement is any public land to which rights may be imitated by settlement under existing laws,"

and he should certainly be bound to that proposition for—

The Land Department drafted the Act of June 4, 1897, and stamped it as free from ambiguity.

In the annual report of the Commissioner for 1896, page 71, is printed a copy of the report made by the Department on February 7, 1896, upon the then pending bill, submitting a draft of a bill as a substitute, including the section of the Act of June 4, 1897, now in question, as it was enacted. In this report, which was forwarded with approval by the Secretary, it is said:

> "Furthermore, the technicalities and other difficulties which have heretofore been experienced in construing and administering many of the public land laws have demonstrated the necessity far exercising great care to *avoid all obscure phraseology in legislation of this nature.*"

> "In view of these considerations, it appears advisable that the bill should be redrawn in such a manner as to embrace in substance all the features of the present bill, with certain additional provisions, *and that the whole should be carefully shaped throughout with reference to the results experienced so far in the practical administration of laws of this nature.*"

> "I have accordingly prepared and respectfully submit herewith for your consideration, the draft of a bill as a proposed substitute for the one submitted."

The following language of the Supreme Court is pertinent:

> "It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning, *One of the reasons is that the officers of the Land Department may have recommended the statute—indeed, may have written its words*, or, at any rate, were familiar with the circumstances which induced the legislation."
>
> Midway Co. *v.* Eaton, 183 U. S., 602.

The Meaning of "Open to Settlement."

"Open to settlement manifestly means *not closed to settlement*, and the lands of the public domain are, under the general laws, all open to settlement unless or until withdrawn or reserved.

See Lockhart *v.* Johnson, 181 U. S., 521.

MINERAL AND NON-MINERAL LAND.

By general provision (R. S., 2318) and express provision in the particular laws, known mineral lands are reserved from sale or disposition except under the mining law. But in the case at bar it is admitted that, when the lands in question were selected, no mineral had been discovered or was known to exist in those lands, and we are not confronted with any question involving the application of the mining law or the reservation of known mineral lands, and counsel for the defendant frankly admit that there is no third person interested in the controversy; but inasmuch as certain papers appear in the record which seem to treat of the subject of alleged subsequently

discovered petroleum, we deem it prudent to call the court's attention to the subject, although, so far as this case is concerned, the question is purely academical.

The Government surveyors, from the beginning, have been required to observe and report the characteristics of the lands as surveys are made, and thus has arisen the general classification of agricultural (or non-mineral) and mineral lands. All surveyed public lands have been so classified upon the land records and the Government deals with them upon that classification. See Johnston *v.* Morris, 72 Fed. Rep., 897; Rule 102 Mining Regulations, 28 L. D., 610.

Land so classified as agricultural cannot be changed in legal contemplation to mineral until or otherwise than by the actual discovery of valuable mineral deposits therein. In legal contemplation it remains non-mineral notwithstanding discovery of mineral on adjacent tracts and notwithstanding the strongest probability that a mineral formation on adjoining land extends into the tract in question. And an entry of land as agricultural cannot be defeated by a subsequent discovery of mineral. These principles are so well settled that a mere reference to a few of the leading cases should suffice.

Belk *v.* Meagher, 104, U. S., 279.
Deffeback *v.* Hawke, 115 U. S., 392.
Colorado Coal and Iron Co. *v.* U. S., 123 U. S., 307.
U. S. *v.* Iron Silver M. Co. 128 U. S., 673.
Dahl *v.* Raunheim, 132 U. S., 260.
Davis *v.* Weibold, 139 U. S., 507.
Iron Silver etc. Co. *v.* Mike etc. Co., 143 U. S., 394.
Sullivan *v.* Iron S. M. Co., 143 U. S., 431.

U. S. *v.* Reed, 12 Sawy. 99, 28 Fed., 482.
Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed., 673.
Erwin *v.* Perigo, 93 Fed., 608.
Jupiter Min. Co. *v.* Bogie G. M. Co., 11 Fed., 666.
Ledoux *v.* Forrester, 94 Fed., 600.

And no mining claim can be located or legally exist until actual discovery of valuable deposits of mineral. R. S., 2320.

O'Reilly *v.* Campbell, 116 U. S., 418.
King *v.* Amy & Silversmith Cons. M. Co., 152 U. S., 522.

PETROLEUM NOT MINERAL.

We also deem it proper to suggest that though lands valuable for deposits of petroleum are, under the act of 1896, opened to entry under the placer law in the same manner as lands chiefly valuable for building stone under the act of 1892, yet in fact and in contemplation of the land laws, petroleum is not mineral and lands in which there are even known deposits of petroleum are not for that reason mineral, and are not reserved from settlement and entry; but, this subject being also academical only, instead of pausing here, we present it more fully in appendix A, hereto. In this connection it seems proper to notice also—

THE STATUS OF THE PROTESTS.

The court will understand that a protest is a mere admonition to the government and the protestant merely *amicus curiæ*, as it were.

A protest is not the initiation of a contest, for a contest can only arise where adverse parties are applying for patent from the government.

The government is not required to take action upon a protest, but will (as was done here) ignore it if it fail (as did the protests here) to allege facts sufficient to warrant action, or if the government, through other sources, have knowledge of the facts and see that there is no ground for action, as is also the case here.

A clear definition by Mr. Justice Brewer, of the status of a protest, will be found in Wight *v.* Dubois (21 Fed., 694),

In view of the admission in the pleadings that the selected lands were at the time of selection non-mineral and unoccupied, it will be apparent, as we suggested before, that the protests have only a historical bearing on the case.

A third person cannot set up the weakness of an entry or selection of public land made by another, nor can a third person call upon that other to defend his entry or selection.

N. P. R. Co. *v.* Saunders, 166 U. S., 631.
Sioux City *v.* Griffey, 143 U. S., 32.
Tarpey *v.* Madsen, *supra.*
Lizzie Bergan, 30 L. D., 266.

The United States deals directly with its grantees and not through third persons.

Hawley *v.* Diller, 178 U. S., 486.
Lee *v.* Johnston, 116, U. S.

As we have shown, after an entry or selection is made, the issuing of a patent is a matter entirely between the government and the purchaser, and patent can be re-

fused only for the causes mentioned in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*.

THE MEANING OF "VACANT."

The term *vacant*, for the purposes of this statute is defined by the act of March 3, 1883, *supra*, requiring the local officers to give official information as to what lands are *vacant* and what *taken*, that is to say, vacant land is land not taken, and whether land is or is not taken, is by the statute contemplated as being within the official cognizance of the local officers.

But, even in the absence of the act of 1883, the meaning of the term would be too plain to admit of construction.

"Vacant" is a technical legal term in the civil, canon and common law, applying to the condition of title.

Originating in the civil law, and coming down in the Spanish and Mexican systems, vacant land (terranos valdios) meant the mass of public land not taken by individuals.

> "There can be no difficulty in ascertaining what was meant by the term vacant lands. In the common understanding, all the public lands are considered vacant. *The sense of that word amongst our people* is the same as it was under the Spanish Government. The word vacant when applied to lands, means those which have not been appropriated by individuals."
>
> Marshall *v.* Bompart, 18 Mo., 87.

See the elaborate treatment of the subject in the Public Domain, 1883, pp. 1125–1130.

In the canon law (and common law also) the term vavant was applied to the incumbency of a benefice.

Whether or not a church was vacant, was always a question for the ecclesiastical court.

1 Reeves' Hist., Common Law, by Finlason, 365.
Hoffman's Legal Outlines, 574.

"Vacant," as applying to benefices, appears in Magna Charta. See 1 Reeves' Hist. Com. Law, by Finlason, 270, and note by Finlason suggesting that mere *occupation* of *vacant sees* was virtually *usurpation*.

And in the common law "vacant" applied to the condition of the title of a fee—a vacant fee was one of which there was no tenant, irrespective of occupation of the land.

Hoffman's Legal Outlines, 508.

And in the several States, in dealing with their public lands, "vacant land" had the same meaning, viz: not taken by individuals; and from the beginning the term has had the same meaning in the disposition of the public lands of the United States.

The Use of the Word "Vacant" by the Land Deparment in its Official Publications.

Opening any of the General Circulars issued during years past, we find the following (references being to pages of issue of 1899):

> "Any proper information regarding *vacant* lands may be obtained by application at any of the land offices" (p. 1).

Respecting cash purchase and other entries:

> "If the tract is *vacant* and subject to the entry applied for, the register will so certify to the receiver" (p. 6).

An applicant has never been required to furnish proof of non-occupancy in order to obtain a certificate from the register that the land is vacant, and no register could legally base such a certificate upon an *ex parte* affidavit.

Again it is said:

> "Military bounty-land warrants may be located upon any *vacant* public lands of the United States that are subject to sale at private entry." P. 6.

but proof of non-occupancy in such cases has never been suggested.

And by R. S., Sec., 2347, the Commissioer is required to—

> "cause to be located, free of expense, any warrant which the holder may transmit to the General Land Office for that purpose in such State or land district as the holder or warrantee may designate, and upon good farming land, so far as the same can be ascertained from the maps, plats and the field notes of the surveyor, or from any other information in the possession of the local office."

The Commissioner selects land that is not only *vacant*, but good farming land as well, and *determines both conditions from the records.*

And (page 136), R. S., 2372, upon the subject of change of entry, is quoted, concluding:

> (The Commissioner), "is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, *if unsold;* but if *sold*, to any other tract liable to entry,"

and then paraphrased as follows:

> "A change of entry, when allowed, will be made from the tract erroneously entered to that intended to have been entered, if *vacant;* but if *not vacant*, the change may be made to any other tract liable to entry,"

thus using *vacant* as synonymous with *unsold.*

Rule 11, of Circular of Feb. 20, 1894, 18 L. D., 168, provides that:

> "The applicant should mark each of the subdivisions affected by the proposed right of way "V" or "Vacant," if it belongs to the public domain, at the time of filing of the map in the local land office, and the same must be verified by a certificate of the register."

The same language is used in other circulars and regulations found in 20 L. D., 165, 27 L. D., 664 and 27 L. D., 497. See also 1 L. D., 37, 2 L. D., 577, and 19 L. D., 76.

For years the annual reports of the Commissioner of the General Land Office have contained an approximate estimate, based upon reports from the various local land offices, of the quantity of *vacant* public lands in the several States and Territories compared with the area of *reserved* and *appropriated* lands. See Reports 1892, pp. 43–44; 1893, p. 50; 1894, p. 72; 1895, p. 66; 1896, p. 17; 1897, p. 17; 1898, pp. 17–18; 1899, p. 16; 1900, p. 20.

And in a report upon the Public Lands and their Water Supply by Professor Newell, of the Geological Survey, compiled partly from information furnished by the land department, published in 1895 and which was before Congress in 1897, lands to which no claim appeared of record were designated as vacant and, on page 510, it is

explained that vacant is a technical legal term meaning not taken of record and not referring to occupation of the land.

The use of the term vacant in the published decisions of the Land Department.

In the vernacular of the Land Department the meaning of the term "vacant" as not taken of record had been uniform previous to the defendant's action in this case. In view of the uniform official usage of the term, as shown under the preceding head, we think it hardly consistent with the limits of this brief to do more than refer to some of the cases not otherwise referred to hereinafter.

State of Florida, 19 L. D., 76.
Thompson *v.* Holroyd, 29 L. D., 362, 364.
Osborne *v.* Havens, 1 L. D., 405, 406.
Goyne *v.* Mahorney, 2 L. D., 576, 578.
Michael McVey, 1 L. D., 37.
Burrus *v.* Cantrel, 15 L. D., 397.
Neal *v.* McMullin, 16 L. D., 296, 299.
Willaimette Valley Wagon Road *v.* Morton, 10 L. D., 458.
Coffin *v.* Newcomb, 24 L. D., 360.
Farmers Canal Co., 13 L. D., 167, 169.
Swanson *v.* Galbraith, 21 L. D., 109, 111.

As said in Coffin *v.* Newcomb, *supra*:

> "An examination of the tract books in your office shows that said quarter is yet *vacant*."

The use of the term "vacant" in previous Legislation.

In addition to the act of 1883, *supra*, we call particular attention to the specific definition of the term contained in the following acts:

Act of April 27, 1817 (3 Stat., 207), where the *register and receiver were authorized to select "vacant and unappropriated lands"* in lieu of the lands reserved. They act only upon the record.

Act of March 3, 1853 (10 Stat. 256); "and to locate such warrant upon the land *so settled upon and improved by him, if the same shall then be vacant.*"

See also acts of March 3, 1877 (19 Stat., 285), and June 15, 1878 (20 Stat., 133).

The act of June 3, 1896 (29 Stat., 197):

> "Provided that this act shall not apply to commutation and homestead entries on which final certificates have been issued, and which have heretofore been cancelled, *when the lands made vacant by such cancellation have* been reentered under the homestead act."

Moreover, the act of October 1, 1890 (26 Stat., 647), provided for lieu selection of—

> "such other *vacant* surveyed Government *land* in compact form and in legal subdivisions, *subject to entry under the homestead and pre-emption laws,*"

and the Land Department understood "vacant" in its technical legal meaning, not taken of record, administered that law accordingly, recognized the register's certificate as the proper evidence of vacancy, and never thought of raising any question of occupancy or requiring any proof of non-occupancy, although that act (differing from the act of 1897) expressly conferred authority to make regulations. See Circular of Nov. 1, 1900 (11 L. D., 434) and General Circular, 1899, pages 71, 72.

But when Congress (in a similar case) deemed it proper to protect "occupants," in the act of July 1, 1898 (30

Stat., 620), it changed the phraseology and used the following terms:

> "Public land, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron or coal, and free from valid adverse claim or *not occupied by a settler* at the time of such entry."

And the coal land law (R. S., 2347-2352), provides for the purchase of the "vacant coal lands" of the public domain, and at the same time provides for the determination of the preference right in case of conflict between adverse claimants in possession. In its circular under this law (1 L. D., 687, 690), the department says, "the register, if the tract is vacant, will so certify to the receiver."

And below will be found references to all the Acts of Congress where the term vacant has been used, and upon examination it will be found that it has been uniformly applied to the condition of title and not to the physical condition of the land.

April 1, 1790, 1 St., 106, 107.
June 1, 1796, Sec. 4, 1 St., 490,491.
March 2, 1799, Sec. 2, 1 St., 724
May 1, 1802, Sec. 7, 2 St., 180.
March 3, 1805, Sec. 4, 2 St., 344.
April 18, 1806, Secs. 1 and 2, 2 St., 381, 382.
April 21, 1806, Sec. 2, 2 St., 395.
April 25, 1808, Sec. 2, 2 St., 502, 503.
February 15, 1811, Sec., 5, 2 St., 617, 619.
March 3, 1811, Sec. 5, 2 St., 662, 663.
April 23, 1812, Sec. 2, 2 St., 710, 711.
March 3, 1813, Sec. 5, 2 St., 812, 815.
April 27, 1816, Sec. 2, 3 St., 307.
March 1, 1817, Sec. 1, 3 St., 347.
May 11 1820, Sec. 2, 3 St., 572.
February 28, 1823, Sec. 1, 3 St., 729.
January 19, 1824, Sec. 1, 6 St., 292.

May 18, 1824, Sec. 1, 6 St., 304.
May 26, 1824, Secs. 1, 2 and 3, 4 St., 65, 66.
April 17, 1828, Sec. 1, 4 St., 263.
May 29, 1830, Sec. 2, 6 St., 437.
March 2, 1831, Sec. 2, 4 St., 451, 452.
June 15, 1832, 4 St., 534.
July 14, 1832, Sec. 1, 6 St., 524.
June 28, 1836, Sec. 1, 6 St., 646.
February 26, 1839, Sec. 1., 5 St., 355.
February 18, 1841, 5 St., 412, 413.
June 15, 1844, Secs. 1 and 4.
February 22, 1849, 9 St., 791, 792.
September 26, 1850, Secs. 7, 9 and 10, 9 St., 469, 471, 472.
January 25, 1853, Sec. 2, 10 St., 745.
March 3, 1853, Sec. 1, 10 St., 256.
March 3, 1857, Sec. 1, 11 St., 251.
June 21, 1860, Sec. 6, 12 St., 71, 72.
March 3, 1873, Sec. 1, 17 St., 607; now R. S., 2347.
March 3, 1873, 17 St., 634, 635.
March 3, 1877, Sec. 2, 19 St., 392.
March 3, 1877, Sec. 1, 19 St., 395.
June 15, 1878, Sec. 1, 20 St., 133
June 9, 1880, Sec. 1, 21 St., 171, 172.
March 3, 1883, Sec. 2, 22 St., 484.
October 1, 1890, Sec. 1, 26 St., 647.
January 12, 1891, Sec. 2, 26 St., 712.
June 3, 1896, Sec. 1, 29 St., 197.
June 4, 1897, 30 St., 36.
June 6, 1900, 31 St., 614.
March 3, 1901, 31 St., 1037.

The term has also been used in the same sense by the courts, as will appear upon examination of the following federal and state cases.

Kissell *v.* St. Louis Schools, 18 How., 19.
Martin *v.* Marks, 97 U. S., 347.
Morris *v.* U. S.
Edwards Lessee *v.* Darby, 12 Wh., 206.

Taylor *v.* Brown, 5 Cr., 242.
Taylor *v.* Meyers, 7 Wh., 26.
Jackson *v.* Clark, 1 Pet., 635.
U. S. *v.* Percheman, 7 Pet., 89.
U. S. *v.* Clarke, 8 Pet., 465.
U. S. *v.* Seton, 10 Pet., 312.
U. S. *v.* Sibbald, 10 Pet., 309.
U. S. *v.* Kingsley, 12 Pet., 479.
U. S. *v.* Clarke, 16 Pet., 232.
Lafayette's Heirs *v.* Kenton, 18 How., 199.
Slidell *v.* Grandjean, 111 U. S. 422.
Erhardt *v.* Boaro, 113 U. S., 538.
Surgett *v.* Lapice, 8 How., 48, 67.
Haydel *v.* Dufresne, 17 How., 28-30.
Savignac *v.* Garrison, 18 How., 136-7.
New Orleans *v.* U. S., 10 Pet., 711, 715, 722.
Fremont *v.* U. S., 17 How., 542, 554.
U. S. *v.* Coe, 170 U. S., 682.
Hays *v.* U. S., 175 U. S., 248, 255.
Chavez *v.* U. S., 552, 556.
Trustees *v.* Sawyer, 1 Taylor N. C., 114.
State *v.* Guano Co., 22 S. C., 50.
Thomas *v.* Daniel, 2 McCord, S. C., 358.
Burnsides *v.* Reid, 2 Wash. Va., 54, 61.
Preston *v.* Bower, 6 Munf. Va., 271.
Ringold *v.* Malott, 1 H. & J., 299, 317.
Lessees of Smith *v.* Brown, 1 Yeates, Pa., 517.
Jackson vs Ogden, 7 Johns, N. Y., 236.
Hastings *v.* Stevenson, 2 Ohio, 8.
Moyer *v.* McCullough, 1 Ind., 341.
Smith *v.* Jones, 3 Sneed, Tenn., 533, 535.
Jasper *v.* Quarles, Hardin, Ky., 469.
Marshall *v.* Bompart, 18 Mo. 84-87.
Tigh *v.* Choquette, 21, Mo., 233-236.

So that in 1897, Congress not only had before it the meaning of "vacant" in the several systems of law and the previous legislative precedents, but also the departmental official usage of the term, particularly the departmental interpretation and administration of the act of

October 1, 1890, *supra*, and even in the absence of the act of 1883, *supra*, it would be presumed that it was intended that the term was used in the same sense in the act of 1897.

> "Congress having, therefore, defined the word in one act so as to limit its application, *how can it be contended* that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materia* and it will be presumed if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the later act, in the absence of anything to show a contrary intention."
>
> Per Davis, J., in Reiche *v.* Smythe, 13 Wall., 162.

See also Chotard *v.* Pope, 12 Wheat., 587.
Wisconsin R. R. Co. *v.* Price, 133 U. S.
Sutherland Stat. & Stat. Constr., Sec. 255.

IV.

THE DEFENDANT'S ERROR WITH RESPECT TO THE MEANING OF THE STATUTE.

He subverts the established rules of interpretation.

He ignores the controlling rule stated above, and while admitting the technical meaning of vacant, seeks to escape the effect of that meaning by an attempted application of a principle which he states as follows:

> "That the words of the statute are to be read in their primary or ordinary sense and according to their usual import and common acceptation,

> unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results,"

which does not apply with respect to technical legal terms, as stated a little further on in the text-writers upon which he relies.

When technichal words appear in a statute they are to be taken in a technical sense unless it appears that they were intended to be applied differently from their ordinary or legal acceptation.

> Sedgwick on Constr. of Stat. and Const. Law, 2d Ed., Pomeroy's Notes, 221.

Words in common use, when found in a statute, are to be taken in their ordinary sense, *and technical words in their technical sense*, unless as respects either a contrary intent plainly appears.

> (Ibid, p. 224.)

> See also Endlich Interp. Stat., 1st Ed., Secs. 2, 74, Dwarris on Statutes, pp. 701, 766.

The defendant reverses the presumptions of interpretation and attempts to limit the meaning of vacant to restrict the operation of the act and suggests that it is incumbent upon the elector to show that the technical legal meaning of vacant is absolutely necessary to the operation of the statute.

On the contrary, the burden is clearly upon the defendant to show that his attempted construction of "vacant" is necessary to the operation of the act and that to adopt the technical legal meaning of the term would be strange and unreasonable. He admits that to adopt the technical legal meaning of the term would not be strange and unreasonable and, in doing so, does he not remove any objection

that could be made to that meaning, under the true principles of interpretation?

Again, the Land Department, in Maher *v.* Hollinsrake 22 L. D. 375, (1896), said the act of 1890, *supra*, is clearly remedial in character and that "all such laws are to be liberally construed so as to effectually accomplish the remedy intended to be given," and, quoting from Selgwick: "so again it has been said that in case of a remedial act *everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it.*

And the defendant has said, in effect, in the case now before the court (R., p. 111), that the act of 1897 is a substitute for condemnation and was enacted for the benefit of the government to enable it to regain title and control of lands within forest reservations, as well as to relieve settlers from the disadvantages of being within those reservations, and in the case of Hyde (28 L. D., 284, 289), he said:

> "The provision in question is remedial in character, and should, therefore, be so construed as to advance the remedy and compass the objects sought. In Endlich on Interpretation of Statutes section 103, it is said: 'The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases.'"

In view of the departmental administration of the act of 1890, *supra*, and the fact that the act of 1897 was passed for the benefit of the government itself, the application of these rulings is too obvious to require discussion.

Again, the defendant says in his decision (R., 112) that there are many instances in public land legislation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claims under the new law from disturbing possessory rights or imperfect claims of others and attempts to draw the conclusion that such was the purpose here.

The necessary conclusion from this premise, however, is that, if Congress had any such intention in this instance, it would have specifically provided for the reservation of such rights, as it has done in all of the instances referred to and in every instance where conditions not shown by the land records were contemplated. It has used the term "unoccupied" alone in one or two instances and "uninhabited" in one (June 3, 1878, 20 St., 30, 89), but in numerous other cases has used words descriptive of the character of possession intended, as, for instance, "so far as the same remain *vacant and unappropriated and not interfered with by an actual settlement* under any existing law" (Act March 3, 1857, 11 St., 251); "vacant and unappropriated and not interferred with by any preemption, homestead or other claim under any law" (Act March , 1877, 19 St., 285); "*vacant unoccupied* lands of the United States *not settled upon or used for municipal purposes nor devoted to any public use of such town*" (Act March 3, 1877, 19 St., 392); "vacant unappropriated lands * * provided that all actual settlers now residing in said lands shall be allowed to enter" (Act June 15, 1878, 20 St., 133); "any *vacant land* belonging to the United States *subject to preemption entry so as not to interfere with preemption rights*" (August 8, 1846, 9 St., 668).

The language of Mr. Justice Brewer, in Del Monte M. & M. Co. *v.* Last Chance M. & M. Co. (171 U. S., 55, 77), is pertinent:

> "We make these observations because we find in some of the opinions, assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps these rules may have all the virtues which are claimed for them, and if so, it were well if Congress could be persuaded to enact them into statute; but be that as it may, the question in the courts is not, What is equity? but, "What saith the statute?"

The defendant is unable to find any authority for his attempted substitution of "unoccupied" for "vacant" and is reduced to citing language casually used by the Supreme Court in the Baca Float case (Shaw *v.* Kellogg, 170 U. S., 312) on May 2, 1898, after the passage of the act of 1897. This case did not involve the meaning of the term "vacant" but turned entirely upon the question of when title vested under the act of 1860 as affected by alleged subsequent discovery of mineral.

The defendant, however, overlooks the fact that, in 1860, Congress was legislating with respect to territory recently acquired from Mexico and using the term "vacant" in its well understood sense in the Mexican, as well as our own system. Private Spanish and Mexican grants were at that time in course of determination and confirmation and titles under valid grants were recognized by the United States, and lands covered by such claims were by the act of July 22, 1854, reserved from sale or other disposal until final action.

There was not at that time, nor until 1862, any general law authorizing or permitting settlement or occupa-

tion previous to survey, but the act of 1854, *supra*, had made a donation of land to residents of the Territory in 1853 and such persons who had removed to that Territory or should remove there and settle between January 1, 1853, and January 1, 1858, on condition of actual settlement and cultivation for not less than four years, to be forfeited, however, on the failure to designate boundaries within three months after survey. This act expressly provided that lands covered by private land claims should not be subject to these donations. By reason, however, of the Indian troubles, few, if any, settlements were made under this act, and it was unsafe to venture into the country without military escort (see *re* Garcia, 1 L. D., 279), and a land office was not established in New Mexico until 1858. As held in the Garcia case and many others, these donations were *not* grants *in præsenti*, and settlement to be valid must have been made before January 1, 1858, so that the act was practically inoperative. In 2 L. D., 522, it was held that a donation claim alleging settlement after January 1, 1858, was void on its face and did not segregate the land and exempt it from a railroad grant; and *in re* Ramirez, 1 L. D., 284, and other cases, it was held that such an invalid donation claim did not prevent the land being "*vacant and subject to entry.*"

So that in 1860, in legislating to effect a settlement of the conflicting Las Vegas claims, Congress did not deem it expedient that a single instance of settlement, where claim had *not* been filed in the local office, and which might, by reason of abandonment or failure to file within the time limited, never vest, should operate to defeat the location of one of these immense Baca Floats, and so ignored mere settlements, if any, under the act of 1854, and threw open to the Baca heirs all of the vacant lands, which term excluded only lands covered by private land

claims by virtue of the reservation in the act of 1854, and lands which had been taken on the records of the land office.

In administering the Baca Floats, the Land Department assumed the investigation of the character of the land and very properly directed a report from the Surveyor General, whose duty it would be to report any private land claims within the boundaries selected, and a report from the local officers, whose duty it would be to report the state of the record. The function of the Surveyor General is mentioned by the Court, in Shaw *v.* Kellogg, as being derived from the act of 1854.

So that the meaning of "vacant" in the Act of 1860 if any corroboration were necessary, is thus clearly seen to be the same as in all previous legislation and Land Department usage.

In 1862, however, Congress passed the general law which threw open all the unsurveyed lands to settlement, and so, when, in 1864, upon the application of the Baca heirs for permission to transfer the location of one of their floats, Congress passed the act authorizing them to locate this float upon *unoccupied* land, a reason for the change of expression is found in the presumed intention to protect settlers under the act of 1862, conditions having changed materially.

Occupied, however, is also a legal term, applying, in the strict sense, to the condition of title. As said in Bouvier, Law Dictionary:

> "Occupancy is sometimes used in the sense of occupation or holding possession; but this does not appear to be common legal use of the term."

In view of these considerations, *and as all land taken of record is necessarily legally occupied*, it is evident that the Supreme Court, in Shaw *v.* Kellogg, casually used the term "occupied" as legal or technical antonym of vacant, there being no single word which exactly expresses the negative of vacant in its legal sense.

In Belk *v.* Meagher, *supra*, the Supreme Court carefully distinguishes between *vacant in fact* and *vacant in law*.

The defendant also endeavors to draw support from casual language of the Supreme Court in Atherton *v.* Fowler (96 U. S., 513) a case which turned entirely upon the question of possession gained by violence as affecting preference right of entry, between rival settlers and endeavors to infer from the expression "it had reference to vacant land, to unimproved land," that the court used the term vacant in the sense of unoccupied in fact; but at the same time he urges that "vacant" in "vacant land open to settlement" must mean something different from "open to settlement" The same argument would necessitate a meaning for "vacant" different from "unimproved" in "to vacant land, to unimproved land," and different from "unoccupied" in "vacant unoccupied land" as used in some of the statues, *supra*, The Department has uniformly held that there can be no occupancy of public land without *improvment*, and it is needless to suggest that the court, in referring to land that could be lawfully settled upon, meant that it must be vacant of record and not already settled upon by another.

Moreover, as we will show later, the Land Department and the House Committee on Public Lands, shortly after the decision in Atherton *v.* Fowler, emphatically declared that occupancy could not operate to prevent land from being *legally vacant* and subject to entry, and the Land Department has uniformly understood the court in Ather-

ton *v.* Fowler as not intending that "vacant" meant "unoccupied."

The same considerations apply to the language of the court in Hosmer *v.* Wallace, (97 U. S., 575), and these three cases being thus disposed of, (if indeed any reference to them were required) there is left no show of authority for the defendant's attempted construction of "vacant."

As the defendant himself in *re Cobb* (31 L. D., 220) and Bakersfield Fuel and Oil Co., *v.* Saalburg (ibid, 312, 314) has repudiated the clearly erroneous suggestion of the majority opinion of the Circuit Court of Appeals in Cosmos Exploration Co. *v.* Gray Eagle Oil Co., (now pending in the Supreme Court on Appeal) that exploration might be occupancy, and has held that land is vacant and open to selection until actual discovery of mineral, notwithstanding exploration, it is hardly necessary to discuss the last mentioned case.

It seems proper, however, to call attention to the case of the Olive Land and Development Co. (103 Fed. Rep., 568), where Judge Ross delivered a sound opinion with respect to the meaning and effect of the act of 1897, and which case was never appealed. Shortly afterward in the Cosmos Exploration Co. case (104 Fed., 20), presenting the same questions, the same judge held that the court had no jurisdiction while the case was pending in the Land Department, but nevertheless proceeded to consider the merits and, in the course of his remarks, suggested that it was at least doubtful if exploration before discovery might not prevent land from being vacant. The case was thereupon appealed to the Circuit Court of Appeals which divided in opinion, the majority (two judges) holding that the court had no jurisdiction, but, like Judge Ross, going on to discuss the merits of the case

and while admitting that "no valid location of a mining claim can be made under the mining laws until a discovery of mineral," nevertheless, like Judge Ross, suggest that the mere presence on the land of miner or explorer might prevent the land from being vacant. Appeal from this decision is now pending in the Supreme Court and, for that reason alone, it could not be regarded as authority or precedent; but having decided aaginst the jurisdiction of the court it will be seen that the remainder of the opinion is pure *dicta*. The dissenting opinion of Ch. J. Gilbert, however, is a clear-cut, sound and logical treatment of the case sustaining the jurisdiction and confirming Judge Ross' views in the Olive case and these two last mentioned opinions are so convincing as to entirely remove any credence that could be given the *dicta* in the majority opinion in the Cosmos case. It is also to be observed that the contention of the defendants in the Cosmos case is stated in the majority opinion to be that, though the selected land was vacant land open to settlement at the date of selection, yet the land remains open to exploration for mineral after selection until patent issues. This doctrine was years ago overthrown in Stark *v.* Starr, 6 Wall., 406, and cases cited and has been rejected by the defendant in the case at bar, but yet Judge Ross and the majority of the Court of Appeals in the Cosmos case attempt to resurrect this exploded doctrine to defeat their jurisdiction.

It is to be borne in mind always that it is admitted in the pleadings here that there was no occupation of the land in any sense or degree, so that even the erroneous views of the majority in the Cosmos case have no application.

V.

EVEN IF THE TERM "VACANT" COULD BE HELD TO MEAN "UNOCCUPIED" IT WOULD BE EQUALLY CLEAR THAT THE DEFENDANT'S ACTION COULD NOT BE SUSTAINED.

Having shown that the language of the act is, as the defendant had previously held, too clear to admit of construction, the whole fabric of his defense falls; but, even from his changed position with respect to the meaning of the act, his action cannot be sustained.

It seems proper to inquire, first:

What the defendant means by unoccupied.

As we have said before, it is admitted in the pleadings that there was no occupation in any sense of the land in question at the time of selection and that no mineral had been discovered therein, and we pause to suggest that this portion of the discussion is also academic and is submitted wholly in the abstract, with the sole purpose of placing the subject fully before the court.

It will be observed that the defendant in his answer limits his attempted application of the term "vacant"

> "to exclude land in the actual occupation of any person or persons under the local customs or rules of miners, which said customs and rules are by statute incorporated into and become part of the laws of the United States."

He invokes no custom or rule of miners, however, but relies wholly on the statute.

In any event, such local rules and customs must be consistent with the statute and are void if they transcend

the statute or attempt to confer rights not conferred by the statute. R. S. 2319.

R. S., 2320 forbids occupation of land prior to discovery of valuable mineral deposits and it is clear that explorers for minerals cannot, in a legal sense, occupy land which they may be exploring, but have at the utmost a mere license to explore. See O'Reilly *v.* Campbell and other cases *supra*. As the defendant himself said in the case of Cobb (31 L. D., 220):

> "Until this condition precedent (filing non-occupancy affidavit) is complied with the land is subject to exploration under the mining laws, and if it is discovered or found to be mineral in character, it is no longer subject to selection, and no right can be secured by any subsequent attempt to complete or make effectual an incomplete selection under which no right vested prior to the development of the mineral quality of the land."

(See also Bakersfield Co. *v.* Saalburg, 31 L. D., 312, 314).

And the defendant has in reports to Congress, suggested that the existing laws do not, *until actual discovery*, protect prospectors exploring for oil from interference by selection under the act of June 4, 1897, and urged the passage of retroactive legislation to protect locators and prospectors; besides unlawfully attempting to withdraw millions of acres of land from entry or selection, saying that by such withdrawal, exploration and rights attaching upon discovery of mineral were not interfered with. See Reports Sec'y. Interior, 1900, p. 45-46, 1901, p. 52; Reports, Commr. G. L. O., 1901, pp. 87, 88, 1900, pp 75, 380.

The defendant in his report for 1900, (p. 46) says:

> "It was recognized, however, that the existing mining laws did not sufficiently protect mineral locators, who had based their locations upon surface indications of the existence of petroleum, owing to the fact that the character of petroleum deposit differed materially from that of other placer deposits, *and that the existence of such petroleum deposits could not, as in the case of other deposits, be established except by means of wells*, which require vast labor and expense.
>
> "Thereupon bills were introduced in Congress which proposed to allow locators of mining claims alleged to be valuable for petroleum deposits—
>
> 'Three months from and after the marking of their claims on the ground within which to begin work for the purpose of completing discovery, and such discovery when made, while working the claim with reasonable diligence, shall relate back and have effect nunc pro tunc as though made before or at the time of marking the claim on the ground.'"

These bills, he says, were returned with the recommendation that the time for making discovery be extended to twelve months.

So that attempted location and exploration before discovery of mineral do not amount to occupancy as the defendant intends that term. But, as he has in other cases attempted to apply the term "vacant" to exclude land under other conditions, we will, in order to present the whole subject, consider the full extent of his attempted distortion of the term.

He has held that "uninhabited" is not the equivalent of "unoccupied" (*Re* Cobb, *supra*). Conversely, "inhabited" cannot be the equivalent of "occupied," in his view.

And in the case of Frank Johnson (28 L. D., 537), he

held that *bona fide* improvement and cultivation, without residence, were occupation within the meaning of the term as used by Congress in the Greer County legislation.

And in Renville *v.* Givens (8 L. D., 557), *bona fide* cultivation and improvements pending completion of dwelling were held to be legal occupation within the meaning of the term as used in the Sioux Half-breed Scrip act.

And in Porter *v.* Landrum (21 L. D., 352), Graham *v.* Hendrixson and Barnet *v.* Burkhart (decisions of September 4, 1901, unreported), the defendant has made the *right* of homestead entry based upon *bona fide* legal settlement, the criterion in contests between selectors under the act of 1897 and homestead applicants and *put the burden of proof upon the settler.*

And in Leaming *v.* McKenna (31 L. D., 318), the defendant held that the selector, in his affidavit, must state the facts regarding the possession of the land by another so that the Department itself could determine its effect upon the selection.

That mere possession without color of right (which is trespass only, Ewing *v.* Barnel, 11 Pet., 41), cannot be contemplated, is shown by the act of February 25, 1885, (23 Stat., 321), prohibiting occupation of the public lands except by authority of some statute, and by the action of the Land Department and House Committee on Public Lands shortly after the decision in Atherton *v.* Fowler, when the subject of unlawful occupancy of the public domain was agitated and the passage of the act of 1885, to prevent such occupation, was being urged upon Congress.

On August 7, 1882, the House Committee, in its report on the then pending bill, said :

"In the State of California, and in others of the States and Territories, many ranchers or herders, have settled on the public lands without claim or pretense, or title or possessory rights, and have enclosed large tracts of the same with fences. Such lands, if *vacant* and *unoccupied*, would be eagerly sought for homestead and pre-emption purposes. But the fact of their occupation, so unlawful, and though, in legal contemplation, they are *vacant and subject to homestead entry and pre-emption entry*, deters the settlers from making entry thereon."

The Public Domain, 1883, page 1169.

On March 26, 1883, Secretary Teller, in a letter to the Commissioner (*re* McKittrick, 2 L. D., 638) in reply to a communication transmitting a "petition and resolution of citizens of Barbour County, Kansas, relative to the unlawful enclosing of large tracts of *vacant* Osage Indian lands in said county," said:

"I need not advise you that enclosures of the character described are unauthorized and illegal, or that settlement on such lands is limited to one hundred and sixty acres, and that such occupation does not legally exclude *bona fide* settlement by another. Such trespass on the public lands is equally offensive to law and to morals as if upon private property, *and lands not legally so appropriated are vacant and subject to disposal to whomsoever legally applies for them.*

* * * * * *

"The enclosure of McKittrick and Andrews is illegal and against the right of others who desire to settle or graze their cattle on the enclosed tracts. It gives them no exclusive right to such tracts, and they can not thereby, or by threats or by violence, prevent entry thereon by others who desire to graze on the same land or to enter thereon for any purpose within the law. This Department

> will, therefore, interpose no objections to the destruction of their fences by persons desiring to make *bona fide* settlement on such enclosed tracts."

The same considerations apply to explorers who attempt to take and hold exclusive possession of vacant land open to settlement. They have no exclusive right of exploration, but a mere license to explore in common with the public until they discover mineral or until the land is taken by an individual.

And on April 5, 1883, pursuant to Secretary Teller's direction, the Land Department issued a circular on the subject of unlawful occupation, which we quote:

> "In view of the numerous complaints of the unlawful enclosures of public lands for stock range purposes, and consequent impediment to settlement, all persons are hereby notified, as follows:
> "The public lands are open to settlement and occupation only under the public land laws of the United States, *and any unauthorized appropriation of the same is trespass.*"

And see discussion of Atherton *v.* Fowler in Powers *v.* Forbes, *supra* and Thompson *v.* Holroyd, 29 L. D., 362.

So that—

Occupancy, as the defendant intends it is not mere presence on the land but possession by authority of law—

that is, the possession of a miner after discovery or the possession of a *bona fide* qualified settler. The first is immaterial, because discovery of mineral would primarily reserve the land from entry or settlement. And with respect to the second, the Supreme Court has established the principle that settlement, without filing, does not seg-

regate the land from the vacant public domain or give any right except as between rival settlers.

> "As Mr. Justice Miller said in Frisbie *v.* Whitney, 9 Wall. 187, 19 L. ed. 668, the rights of a claimant are to be measured by the acts of Congress, and if they show 'that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient."

> "As Emblem never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the act of 1894."

> Emblem *v.* Land Co., 184, U. S. 660,664.
> See also Tarpey *v.* Madsen, *supra.*

It has also been settled that a mineral claimant with a valid location predicated upon discovery, has only a present (not vested) right of possession, subject at any time to revocation by the Government, and no interest whatever in the title to the land unless he applies for patent.

Black *v.* Elkhorn etc. Co., *supra.*

The action of the defendant is an attempt to resurrect the exploded doctrine that a claim to public land can attach by occupation.

For a long period the Land Department administered the railroad land grants upon the theory that a claim to land could attach by mere occupation and, as between the railroad and settlers, held that the rights of the railroad became fixed at the time the company actually located its line of road on the land, and the rights of settlers at the time of settlement on the land, both conditions being the subject of oral proof, but the Supreme Court, in a

series of cases, exploded the idea of oral proof in such cases and held that, on the one hand, the definite location of the road could be evidenced only by the filing of maps in the land office and, on the other, that a claim could attach only by filing in the local land office, thus establishing the safe rule that rights must depend upon the record and not upon fugitive and uncertain testimony of unrecorded acts and intentions of individuals.

As Justice Brewer said in Tarpey *v.* Madsen, *supra.*

> "This unfortunate uncertainty and instability of title continued until the decisions of this Court in Van Wyck *v.* Knevals, 106 U. S., 360, and Kansas P. R. Co., *v.* Dunmeyer, 113 U. S., 360."

But examining the defendant's theory it is apparant that—

"Unoccupied" is merely a magic term to conjure with, a mere shadow without substance.

As we have shown, discovery of mineral therein reserves land from settlement or entry except under the mineral law and the only occupation of *non-mineral land* permitted by law in 1897, prior to filing or entry, was *bona fide* settlement by intending homesteaders, who were allowed three months within which to file in the local land office. So that such settlers are the only class of occupants who could be protected by giving vacant the effect attempted to be given it by the defendant.

But, under the practice of the Land Department it would not be necessary to substitute "unoccupied" for "vacant," in order to protect such a settler, for

The Land Department has uniformly and consistently protected a right of entry based upon bona fide legal settlement as against claimants under any of the laws, as well those that contain the word "vacant" as those that do not, in defining the class of land made subject to entry or purchase.

And even an express reservation of "occupied" land or land "settled upon" is not, and never has been held to be, an exception of the land from the grant or general disposition, as between the Government and grantee or entryman, but a mere reservation of the right of the settler or occupant which he might abandon or forfeit.

For years the department has said in its general circular that private entry or warrant location can be made only of *vacant* lands and yet has not thought of requiring proof of non-occupancy; but after the money has been paid, or the warrant surrendered, and certificate of sale issued, it has entertained a contest initiated by an applicant claiming settlement prior to purchase or location and determines the qualifications and good faith of the contestant and the legality of his settlement and awards him the land if he establish his right, making the *prior right* of the contestant the issue, and not the *mere occupation* by him. He might fail for several reasons—he might not be a citizen, he might be the owner of other lands, he might lack other qualifications, or his occupation might not amount to legal settlement.

The following quotations from Powers *v.* Forbes, 7. C. L. O., 149, are pertinent:

> "But his failure left the land subject to Forbes entry, after which he was an *occupant* only of the public lands without any valid claim, and had no

more right to the tract than if he had never claimed any, because his continued occupancy was unauthorized by any law providing for the disposal of the public lands. His right having thus become extinct, the denial of further disposition of the tract would practically withdraw it from market and sustain a possession manifestly held in violation of law. The effect of such unlawful occupancy would be to permit the occupant to escape the liabilities which attach to the acquisition of title. Taxation of the real property would not be possible because, so far as the record would show, the title still would remain in the United States. The erection of a house and the inclosure of land would not only be deemed a part of the conditions the performance of which would vest the title, but would be equivalent to title itself; and any unlawful possession and use would create a vested interest which could not be interfered with by the entry of a *bona fide* purchaser. Such result could not have been the intention of the law nor of the court," (referring to Atherton *v.* Fowler). * * *

"The continued illegal possession of the tracts by McManus, could not, therefore, defeat the entry of Forbes; but at the date of such entry the tract was under the law *vacant public land and subject thereto.*"

See also Stoddard *v.* Neigel, 15 C. L. O., 171.

And the same criterion, the right of the settler, was recognized in Show *v.* Bretzke (20 L. D., 72), in a contest between the holder of a cash certificate under the act of October 1, 1890, *supra*, and a subsequent homestead applicant alleging prior settlement. Although the act in that case used the terms *vacant land subject to pre-emption or homestead entry*, the department never thought of requiring any proof of non-occupancy or of rejecting Bretzke's entry because of the mere occupancy of Show; but Show

was required to prove his prior and superior right, and, in order to clear the record and allow his application, Bretzke's entry was canceled, not by reason of any inherent defect, but because of Show's superior right.

And in Coleman *v.* Collins, 10 C. L. O., 199, a contest between a Valentine Scrip location and alleged settlers, it appeared that the alleged settlers acquired no rights under the pre-emption laws by virtue of their alleged settlement and it was held that the land covered by the location of the scrip was at the date of such location subject thereto notwithstanding the *occupation* of the pre-emption claimants, although the act permitted Valentine scrip to be located only upon *unoccupied* and *unappropriated* public lands.

Where the statute has used the term "unoccupied," as in the Valentine scrip act, the supplemental Baca Grant act of 1864 and the Souix Half Breed scrip act of 1854, the department has always given the locators the benefit of the presumption from the record and never required any proof of non-occupancy, but has always thrown the burden of proof upon a subsequent applicant alleging *prior legal occupancy* when issue raised, as in Renville *v.* Givens, and Coleman *v.* Collins, *supra*.

And in the act of March 3, 1857, and other acts confirming grants of swamp lands, which contain the term "*vacant*," in connection with "unappropriated and *not interfered with by actual settlement*," or equivalent language, the State has always had the benefit of the presumption from the record and never been called upon to negative settlement, but the burden of establishing prior *legal settlement* has always been upon the settler, and the mere settlement of itself does not exempt the land as between the State and the Government. As the Supreme Court says, in Water and Mining Company *v.* Bugbe (96 U. S., 165):

> "As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the survey; and if the settler failed to assert his claim, or to make it good, the rights of the State became absolute."

See also Gonzales *v.* French, 164 U. S., 383.
Summers *v.* Eagle, 20 L. D., 550.
Re Miner, 9 L. D., 550.

All of these suggestions focus in the proposition, of uniform application in the Land Department, that he who first accepts, either by lawful settlement on the land, or filing in the Land Office, as the case may be, the standing offer of the Government contained in any of the various laws for the disposition of the public domain, affects a contract for the purchase of the land of which all subsequent applicants or purchasers under any of the laws, whatever their language, must take notice. As said by the Supreme Court, in Shepley *v.* Cowan, 91 U. S., 330:

> "In all such cases, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

But occupation of public land, without lawful right, has never been held, even by the Land Department, to prevent the purchase of the land under any of the laws, even though their operation be limited to unoccupied lands—always distinguishing between lawful and unlawful occupation (Slate *v.* Dorr, 2 L. D. 635), and only invoking the former in aid of the occupant asserting a right, and who only can assert or have any benefit of it. The Government cannot set it up for him or itself.

The Supreme Court, however, as we have shown, has firmly established the general principle that even lawful settlement initiates no claim and gives no rights against the Government or a purchaser from it; but, nevertheless, this uniform practice of the Department and the decisions of the Supreme Court just cited show that even when apt language is used to protect occupants, it is the *right* of the settler or occupant added to mere presence on, or possession of, the land, that constitutes occupation, and that it is such legal occupancy that the defendant contemplates by the use of the term and which has always been protected in the Land Department against applications under statutes that do not use the term "vacant" or the term "unoccupied," as well as those that do, provided the occupant come in, assume the burden and establish his prior right of entry based upon his occupation.

In the uniform practice of the Department, and under the decisions of the Supreme Court, mere presence on the land is nothing, and even lawful settlement has no standing unless and until the settler files entry or application and advances from an intention having existence only in his own mind to a formal record declaration of which others can take notice.

And if the settler fail to apply within the statutory period or lack qualifications, or fail in his proof of settlement, the land has always been regarded as having remained not only vacant and open to settlement, but unoccupied as well, for the purposes of acquiring title under any of the laws.

And it will be seen that this is a, possibly unconscious but nevertheless real, recognition of the well-known principle that *the vendor of land cannot set up a defect in, or dishonor, his own title.*

A defect in the vendor's title may be waived by the

vendee who may insist upon taking the property. The vendor cannot rescind the sale or defend a suit for specific performance by suggesting an infirmity in his own title.

Adams' Equity, 87.

We pause at this point to suggest that even had the act of 1897 contained the term unoccupied in place of the term vacant, and aside from all other considerations, the application of the act would still be too clear to admit of the consequences attempted to be deduced by the defendant for, as we have shown, the term unoccupied could not operate as an exception of the land from the operation of the act but merely as a reservation of the right of a *lawful* occupant, which he might abandon, waive, or forfeit, and it being admitted here that there was no such occupant and that this is a matter wholly between the government and the selector, there would still be presented a clear case for mandamus.

The policy of the defendant in substituting "unoccupied" for "vacant."

It is plain from what has been said that the utmost result of the defendant's substitution of "unoccupied" for "vacant," if permissible, would be to burden the selector with the risk of whatever claim a person in occupation of the land might have, which risk the long established practice of the Land Department would impose upon him without the assistance or sanction of the term "unoccupied."

As we have said, however, this is a purely academic question, because it is admitted in the pleadings that there was no occupation of the land in any sense, at the time of selection, but the argument in the abstract demonstrates that the policy of the defendant in invoking the term "unoccupied" could not have been to protect *bona*

fide settlers, who, under the practice of the department were already protected by their own right of entry, nor to protect possessors of mining claims, because lawful occupation by a miner depends primarily upon discovery and discovery itself reserves the land from settlement, and certainly not to protect trespassers, nor even explorers for mineral, because, as we have shown, the defendant himself has held that only discovery can prevent selection.

As said in U. S. ex rel West *v.* Hitchcock (30 W. L. R. 186):

> "We may infer, of course, that there is some secret reason for dissapproval not disclosed in the record, but if such secret reason there be, the courts can take no cognizance of it."

As ulterior motive cannot be imputed to the head of a department, it must be considered that in this aspect of the case, the ruling of the defendant is merely a plain error of law, and if material here, will be corrected by mandamus.

In the next place—

VI.

EVIDENCE OF NON-OCCUPANCY COULD NOT BE ESSENTIAL TO SELECTION UNDER THE ACT OF JUNE 4, 1897, EVEN IF VACANT COULD BE HELD TO MEAN UNOCCUPIED IN ITS BROADEST SENSE.

It being admitted that there was no occupancy of the land in question when selected. It is apparent that this branch of the subject is also academic, and we treat it wholly in the abstract.

The Land Department can require evidence only when the statute or the rules of contract and evidence so require.

In the administration of the laws relating to the public lands it is a necessary principle that the Land Department acts as the agent of Congress and cannot add to or change the requirements of the law. When the law makes no requirements and imposes no burden, the Land Department can prescribe none. It cannot legislate.

Questions of fact in the administration of the land laws are determined upon the principles of legal evidence and the Land Department is as much bound by the rules of evidence as a court of law.

The primary rules of evidence determine the presumptions of fact, what is *prima faci* evidence of a fact and upon whom lies the burden of proof. And, as applied to the Land Department, the records of that department, by force of the land laws and uniform decisions of the department and the courts, are evidence of the character of the land and the condition of title, and the burden of proof is upon one who sets up anything to the contrary whether he be an individual or the government.

Another rule of evidence is that he who has a *prima facia* case may rest and cannot be required to supplement that case in the absence of a showing sufficient, if true, to overcome that *prima facia* case.

These principles of evidence, as applying in the Land Department, were laid down by Att'y. Gen. Butler in 1836 (3 Op. 126).

So that land appearing upon the records as agricultural and free of any filing entry, or claim, must, from the very nature of things, be presumed to be unoccupied in

fact, legally or otherwise. The legal title draws to it the legal seisin and possession (Ewing *v.* Burnet, *supra*), and land once open to settlement and entry is presumed to continue so (Lockhart *v.* Johnson, 181 U. S., 516).

And the presumption is always that the owner is in exclusive possession and occupancy, and where the contrary is material, as in ejectment or any other form of action, it is incumbent upon the party setting it up to prove it.

In Stark *v.* Starr, 6 Wall., 402, 419, the court, in construing the meaning of the word "possession" in a statute authorizing suit to quiet possession, announced the sound doctrine, saying:

> "We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied by a claim of right; that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Similar questions have arisen in the administration of the public lands of the States and a party relying upon a right founded upon possession or occupancy has always been held to have the burden of proof, the presumption being always that public land is subject to acquirement by the first applicant.

As said in Penrose *v.* Griffiths, 4 Binney, 221:

"The origin of a party's title lies peculiarly within his own knowledge, and in the case of a naked possession, it would be nearly impossible for the opposite party to fix its commencement with any reasonable degree of certainty. Convenience, therefore, seems to require that the party making the objection should be prepared with the evidence of the facts necessary to sustain it."

"This case has been frequently affirmed in Pennsylvania, and is no longer open to question in that state; Allison *v.* Rankin, 7 Serg. & R., 269; Read *v.* Thompson, 5 Pa. St., 329; Gingrich *v.* Foltz, 19 Id., 40; B. T. C., Co. *v.* R. C. Co., 65 Id., 435.

"In Read *v.* Thompson, supra, the reasons advanced in Downing *v.* Gallagher are again repeated, and persons occupying public lands are considered as occupying the same in privity with the title of the commonwealth and its grantees and not by a paramount title, and are held bound by recitals contained in the patent issued by the commonwealth, within the rule of evidence first stated. Woodward, P. J., in charging the jury in Read *v.* Thompson, supra, which charge was approved on appeal, said: "All lands are derived from the commonwealth, and the man in possession must hold under her. He cannot hold adversely, and to protect his possession he is obliged to appeal to some of the commonwealth's statutes, either of pre-emption or limitation, or to her common law, which is his shield against every assailant."

Boatner *v.* Ventress, 20 Am. Dec., 276-7.

And entry upon lands is presumed to be subservient to the legal title. (Link *v.* Doerfer, 42 Wis., 395)

Again, the owner of land is presumed to know

who, if any one, is in actual possession of it and what right or interest such occupant has or claims, and the case falls also into the category of those where an adverse party is not required to prove facts within the particular knowledge of the other. Boetner *v.* Ventress, supra.

So that when the land records make a *prima facia* case of non-occupancy that *prima facia* case must prevail in the absence of proof to the contrary.

Kelly *v.* Jackson 8 Pet., 632.

Lillienthal *v.* Tobacco Co., 97 U. S. 268.

These principles have always been in contemplation of Congress and specific provision has been made as to the form and substance of proof whenever it was deemed necessary or proper that any fact or condition not appearing on the records of the Land Department, and *as to which the burden of proof is not thrown upon the claimant by the rules of evidence* should be shown by him.

And where the law has made no specific requirement of proof, the Land Department can require proof only in cases where the burden is thrown upon the claimant by the application of the rules of evidence.

This necessarily follows from the principle that the regulations and requirements of the Land Department must be consistent with law, and a requirement that subverts a rule of evidence, which is as much law as a rule of property, is inconsistent with law and void.

On this point, we have the decision of the Supreme Court in Shaw *v.* Kellogg, *supra*. In the administration of the Baca Floats, where the language of the act was "vacant non-mineral land" and the inquiry involved the ascertainment of the existence of any private land claims or known mines, the Land Department properly assumed

the investigation and determination of those matters and required no proof whatever from the locators, The Supreme Court approved this course and held that the character of the land was properly determinable by the Surveyor General, that is, by the Land Department, and there was no suggestion that there was any burden of proof upon the claimants or any defect in the location for failure to furnish proof.

The administration of the Valentine scrip act is a good illustration of the long established position of the department with respect to the presumptions surrounding occupancy.

The act provided that the scrip might be located on any "*unoccupied* and *unappropriated*" public land. No requirement of proof of non-occupancy was ever made, but the local officers were instructed to use the application blanks provided for military bounty-land warrants, merely changing the style and title and date of the act (See Instructions of June 17, 1874, 1 C. L. O., 69) and the burden of proving prior legal settlement and right of entry was always thrown upon a contesting settler. (Coleman *v.* Collins, *supra*).

Also the administration of the Sioux Half-Breed Scrip Act, which provided that the scrip might be located upon any of four classes :

First. Land within the reservation, upon which at date of the act the locator was an actual *bona fide* settler.

Second. Any land in the reservation which at the date of the act was not so occupied by a half-breed or any other person who had gone into the reservation under authority of law.

Third. Any other unoccupied lands subject to pre-emption or private sale.

Fourth. Any other unsurveyed lands not reserved by

the Government, upon which the locator had made improvements.

Proof was not required with respect to the second and third classes of land, but the attention of the local officers was merely called to the fact that the scrip could not be located on any lands on which there was an actual settlement, leaving it to the settler himself to come forward within the time allowed by law and establish his right.

Renville *v.* Givens, *supra.*

But with respect to the first and fourth classes of land, where the settlement of the locator himself was involved, the local officers were directed to require proof of such settlement. Circular May 28, 1878, (3 C. L. O., 126). Circular February 22, 1864, (1 C. L. O., 142).

And also the administration of the railroad land grant acts which excepted lands to which claims had *attached.* The land department, as we have shown, for a long period construed these acts as excepting lands to which a preception or homestead right had attached by mere settlement alone, but yet never called upon the railroad for proof of non-occupancy. The presumption was always that land within the place limits was within the grant and the burden was always upon an applicant to establish existing legal settlement at the date of definite location of the road, and this notwithstanding there might be pre-emption filing of record.

See Freeman *v.* Railroad Co., 2 L. D., 550, where Acting Secretary Joslyn says:

> "The burden of proof rests upon Freemen to show affirmitively that at said date a valid, subsisting adverse right had attached to the premises. *Such a state of facts cannot be presumed.*"

And in Slate *v.* Dorr, *supra*, Secretary Teller, lays down the broad general doctrine of the department with respect to presumptions and burden of proof.

> "Whilst the doctrine is sound that an entry is an appropriation of the land covered by it, it cannot be held to be an appropriation of land already appropriated. Where there is a valid prior preemption claim to the tract, the settlement is an appropriation of it and the entry subsequently allowed is subject to such claim; therefore, *the entry appropriates it against the whole world except the prior settler* and as against him it is null and void if he duly asserts his claim. The assertion of such claim necessarily initiates a contest, *and the rule is that the burden of proof is on him who contests the claim first of record.*"

The defendant suggests, as the sole reason of the requirement of proof of non-occupancy, that the land department cannot know the physical condition of any particular tract.

This proposition is so weak as to be unworthy of a moment's consideration. As we have shown, the Government is conclusively presumed to know the condition of its lands. The presumption is that public land, appearing on the records as vacant, is unoccupied, and the burden is upon any adversary to overthrow the presumption if an issue be raised; and if evidence *dehors* the record be deemed necessary in order to administer the act of 1897, it is the duty of the Government, like an individual in the same plight, to procure it.

If it be suggested that the Department has been provided with no means of investigation, that of itself would be conclusive evidence that Congress did not intend that the inquiry should go beyond the record.

The Land Department, however, has the means. It provided means in the Baca Float cases and assumed the burden of investigation through the Surveyor General; and Congress contemplates that it has the means for, by the act of July 1, 1898 (30 Stat., 620; Gen. Circular of 1899, p. 57), it provided that the Secretary should ascertain and deliver to the railroad a list of tracts which had been purchased or *settled upon or occupied by settlers.*

And the language of the Supreme Court, in Mullan v. The U. S., previously quoted, is pertinent here:

> "It is no doubt true that the actual character of the land was as well known at the Department of the Interior as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853."

And *in re* Stimson, 15 L. D., 255, the Land Department decided, when it was desired to hold the applicant to his contract, that a non-mineral affidavit was not essential to the vesting of title, for the character of the land could be shown by other means.

And, as early as 1860, it was held that the affidavit of a party claiming a pre-emption right was not the only means of ascertaining the fact (9 Op. Att'y Gen., 499).

If it could be held that evidence *dehors* the record were necessary to administer the act of 1897 it would follow that the local officers were vested with *quasi-judicial* power and required to determine the question of fact and, in doing so, they could act only upon legal evidence in some formal proceeding for that purpose, and not off-hand upon an *ex-parte* affidavit of the party in interest, which affidavit is in no sense evidence, but mere hearsay, as we show

presently. And if occupancy could be held to operate as a reservation and limitation upon the power of the land department to permit exchange under the act of 1897, as the defendant contends, such an investigation and formal proceeding would be necessary, for it would be incumbent upon the department to vindicate its authority in every instance. Then what becomes of the elements of the exchange, that the titles shall pass contemporaneously, that the selector shall have title for title and that he shall be put to no expense, and what becomes of the act of 1883, and the official instructions of the land department, *supra*, directing him to go to the local office to learn if land is "vacant?"

Instead of the simple transaction, plainly contemplated by the statute, of going to the local office with his relinquishment and selecting a tract from the register's list of vacant lands, and closing the deal without expense to him, he becomes involved in a lawsuit that may drag its weary course through the land department and into the courts and in the end he may lose not only the land he has selected but the land he has relinquished to the Government, as well, for there is no way of recovering his title except by appeal to Congress for relief.

VIII.

THE ALLEGED REGULATION REQUIRING A NON-OCCUPANCY AFFIDAVIT IS VOID.

The defendant admits that if "vacant" does not mean "unoccupied," his alleged regulation requiring a non-occupancy affidavit cannot be sustained, so that we need only consider this alleged regulation from his standpoint, but we contend, first, that

The land department has no authority under the act of June 4, 1897, to make any such regulation.

The making of regulations is *quasi* legislation and can be exercised only when expressly authorized by Congress (Harvey *v.* United States, 3 Ct., Cls., 40).

Authority to make regulations under the act of 1897 respecting the exchange of forest reserve land, is not found in the act itself. The act is silent in that respect, so far as the subject of forest lieu selection is concerned, and such silence is a negative of such authority and the strongest evidence that Congress deemed regulations unnecessary, as in fact they are, so far as the public is concerned, for, as we have shown, the existing statutes and the rules of contract plainly indicate the manner of proceeding to effect the exchange.

Nor can authority be found in any provision of the Revised Statutes or any general statute.

R. S. 441 merely charges the Secretary of the Interior with the supervision of public business relating to public lands without conferring any authority to make regulations.

R. S. 161 merely authorizes regulations not inconsistent with law for the government of the several Departments, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use and preservation of the records, papers and property appertaining to it. This contemplates only regulations for the *internal* government of a Department, and not regulations affecting the public. See this distinction clearly made in Harvey *v.* United States, *supra.*

That the authority claimed is conferred by either R. S. 441, or R. S. 161, is negatived by the affirmative provision of R. S. 3478, which provides for appropriate regulations to enforce and carry into execution "every part

of the provisions of this Title not otherwise provided for."

Many of the sections of the Revised Statutes under the Title, The Public Lands, contain specific grants of authority to make regulations, copied from the previous statutes incorporated in the Revised Statutes, and R. S. 2478 is a general grant of such authority to cover cases where no special grant appears; but Sec. 2478 is limited, in terms, to the laws embodied in the Revised Statutes, and is not a general grant of authority attaching to subsequently enacted laws, as is conclusively shown by the fact that Congress, in subsequent legislation, has specifically provided for regulations wherever it deemed them necessary. An examination of the acts of Congress printed in the General Circular of 1899, pp. 162, 258, shows that in nearly every instance Congress has specifically provided for regulations, frequently several times in the same act with respect to different subjects, sometimes to be made by the Commissioner, sometimes by the Secretary and sometimes by both; and refrained from giving authority in the remaining instances.

The variation in the designation of the officer to make regulations in the instances where such authority is conferred, in itself negatives a recognition by Congress of general authority in the Secretary to make regulations; and the failure to grant authority is necessarily a legislative negative of such authority with respect to the section of the act of 1897 involved in the case at bar, and, in connection with the absence of any statutory requirement of proof, controlling evidence that Congress did not contemplate an inquiry *dehors* the record.

The alleged regulation is not appropriate.

We have demonstrated that the question of vacancy is

determined by the land records and is within the official cognizance of the local officers and that, even from the defendant's standpoint, no legal purpose is subserved by an *ex-parte* affidavit confirming the presumption arising from the record and also that, in any view, as between the Government and the selector, occupancy of the land is immaterial, and, even if material, an *ex-parte* affidavit is not evidence but mere hearsay. 1 Enc. Pl. & Pr., 335.

No officer can, upon a mere *ex-parte* affidavit, render a legal judgment or issue a certificate as to the character of land.

As said in *ex parte* Sutley, 3 L. D., 248, 250:

"*An affidavit is not evidence; it is merely a formal assurance of good faith on the part of the affiant;* while a deposition, properly taken, is as much the evidence of the deponent as though he were in the presence of the court, and there subjected to an oral cross-examination. *Thus an affidavit*, whether appearing in the verification to a pleading, or in support of an interlocutory proceeding, *is not, in fact or by intent, effective so far as the final judgment is concerned; but upon the matters appearing in a deposition the final judgment may safely rest.*"

If assurance of good faith is the only object of requiring the affidavit the regulation is void, if for no other reason, because the statute contemplates a cold and practical business transaction and the purpose of either party is not an element. Good faith is shown by paying in full for the land selected by relinquishing the land desired by the Government.

There is no legal method of ascertaining the motives of vendor or vendee and no legal issue could be raised upon such a question.

Adams, Equity, 177.
Vernon *v.* Keys, 12 East, 632.

Furthermore, there is here no suggestion of bad faith and good faith being thus admitted the object of the alleged requirement has been accomplished.

The Alleged Regulation is Inconsistent with Law.

The alleged regulation is inconsistent with the statute because it burdens the selector with a requirement not prescribed by nor within the intent of, the statute.

As said by Mr. Justice Brewer, in Whitney *v.* Taylor 158 U. S., 85):

> "At any rate Congress has not seen fit to require an affidavit to a declaratory statement and has provided for the filing of such unsworn statement as the proper means for an assertion on record of a claim under the pre-emption law, and that is all that is necessary to except the land from the scope of the grant."

Congress determines what is essential to vest rights and all that it has required the selector to do is to relinquish his land and select what he wants in place of it. The Land Department cannot burden him with any additional requirements that are not thrown upon him by the rules of contract and evidence.

While trivial in itself, even the expense of making an affidavit is expressly provided against by the act of 1897, and, in requiring an affidavit to be made and filed, the defendant is violating the statute.

In the record at page will be found a copy of an official communication from the defendant to the Chairman of the House Committee on Public Lands, of which the court will take judicial notice, calling attention to numerous cases where the Federal Courts have denied the authority of the Land Department to require affida-

vits not prescribed by statute, and asking for legislation conferring such authority upon the department.

And, as we have shown, this alleged regulation is, even under the defendant's attempted construction of the act, inconsistent with the legal rules of contract and evidence in requiring the selector to supplement a *prima facie* case and make representations to the government as to the character of its own land and contrary to the long established and consistent practice of the Land Department with respect to occupation of the public lands.

VIII.

AT THE TIME THE SELECTIONS WERE MADE THE DEFENDANT HAD NOT MADE OR PROMULGATED ANY REGULATION REQUIRING THE FILING OF PROOF OF NON-OCCUPANCY.

A regulation must not only be pursuant to express authority (Harvey *v.* United States, supra.) appropriate and consistent with law (McFadden *v.* Mining Co., 27 L. D., 350; Anchor *v.* Howe, 50 Fed. Rep., 356), but it must be *certain, and promulgated in same proper and sufficient manner so that the public have reasonable notice of it.*

The alleged regulation was too vague and uncertain to be valid.

The fact that the local officers did not understand that the approval of the form mentioned (if, indeed, it was ever called to their attention), constituted a regulation requiring an affidavit of non-occupancy, and had not required such form to be used or any proof of non-occupancy to be furnished, and had never rejected any selection for lack of such proof, is of itself controlling evidence that the alleged regulation was too vague and

uncertain to be valid; and this is emphasized by the fact that the Commissioner of the General Land Office, who prepared the Instructions and form for selection relied on by the defendant, had not, in this case or any other, regarded a non-occupancy affidavit as essential or understood that said form amounted to a mandatory regulation requiring such affidavit as a condition precedent.

Again, the term "unoccupied," standing undefined, was too vague, indefinite and uncertain to inform the public as to what state of facts a selector was required to negative upon oath and left a wide field for controversy as to what is occupation. The defendant himself demonstrated the ambiguity of the term in the case of Frank Johnson, *supra*, and only recently has he reached any definite position as to its scope (see cases supra) and, as now used by him, it is a mixed question of law and fact (see Leaming *v.* McKenna, *supra*) as to which no one can be legally required to make affidavit.

Recital in a form neither prescribes nor promulgates the substance of the recital as a regulation.

Such a method of making regulations follows the practice of Caligula rather than the rule of law and reason, viz:

> "Law is a rule of action prescribed and promulgated. It is obligatory only on those who know the fact of its existence and, therefore, must be promulgated. It imports a definite order, and must, therefore, be plainly prescribed, that it may be understood.
>
> "Human laws should not only be prescribed in clear and unambiguous language, but be efficiently promulgated or conveyed to the knowledge of

those on whom they are to operate. We have seen that Hobbes considers both so essential to the just notion of law, that he has made them a part of his definition of that term. By the former it is not meant that laws should be written out, as the word 'prescribe' would seem to import, but merely that they be conveyed in language as *free from ambiguity* as possible, be it verbal, written, or printed. *In regard to promulgation of laws, justice demands that they be made known before they become obligatory. The liberty and property of the citizen may indeed be placed in peril by the vague and unintelligible language of the laws; but much more would this be the case were laws permitted to operate without due promulgation.*"

1 Hoffman's Legal Outlines, p. 275.

And the defendant himself, since the petition in this case was filed, realizing the weakness of his position that a mere recital in a form referred to only by number and not printed in any circular or published instruction could constitute a regulation, on July 7, 1902 (31 L. D., 372), revised and reissued his Circular of Instructions under the act of 1897, and inserted therein (p. 375) the following paragraphs. (See also Par. 26, p. 375):

"All papers and proofs necessary to complete a selection must be filed at one and the same time, and until they are presented, no right will vest under the selection."

* * * * * * *

"The affidavit to support a selection based upon relinquishment of land covered by a patent or by a patent certificate must be made by the selector, or by some credible person possessed of the requsite personal knowledge in the premises, and must be filed with and *as a part of the selection.* This affi-

davit must show that the selected land is non-mineral in character; that it contains no salt springs or deposits of salt in any form sufficient to render it chiefly valuable therefore; and that it is not in any manner occupied adversely to the selector. (Form 4–061a.)"

And also printed in the circular, a form of selection (p. 377), and a form of affidavit as well (p. 380).

There being, therefor, in legal contemplation no such regulation when the selections were made, the case in this aspect clearly falls within the principle of Magnetic Healing Co. *v.* McAnnulty; Payne *v.* American Railway Publication Co., and MacFarland *v.* U. S. ex rel Miller, (29 W. L. R., 753), in which last mentioned case the court, citing Roberts *v.* Valentine, says:

> "But the refusal of permission to the relator to build upon his lots as proposed is the denial of the right of property. It is admitted that his proposed buildings conformed in respect of materials, safety and healthfulness to the building regulations proper, and that permission would have been issued as a matter of course had the lots been of the depth of fifty feet. *As that regulation is not within the power conferred to make building regulations, and cannot constitute a defense under the act regulating the subdivision of lots, it is the plain duty of the Commissioners to issue the permit* upon the payment of the lawful fees, which the relator is ready and willing to do. The act required of them being a purely ministerial one, can be enforced by the writ of mandamus."

IX.

Even were the alleged regulation valid, the form and substance of the affidavit were left to the judgment of the local officers.

And those officers, in the exercise of that discretion, accepted as sufficient the affidavits filed with the selection (R.). As those affidavits negative the facts from which legal occupancy could be inferred, the discretion of the local officers has been legally exercised. Those affidavits allege specifically that the land is non-mineral and no portion of it is worked for mineral, thus negativing any lawful occupation by miners and the lawful occupation of the same for any other purpose was legally negatived by the presumptions arising from the land records, which record evidence is of a higher character than a mere affidavit, which is hearsay.

But even had the local officers erred as to the sufficiency of the affidavit, their action, under the rule laid down in Cornelius *v.* Kessel and Brown *v.* Hitchcock, *supra*, could not, in that respect, be reviewed by the defendant, because his supervisory power is limited to questions which go to the validity of the patent and it could not reasonably be suggested to any court that a mere insufficiency in an ex parte affidavit, would invalidate a patent when full consideration had passed.

X.

Even were an affidavit or other proof of non-occupancy essential it could not be a condition precedent to title vesting.

The defendant, in effect, admits this proposition when he relies upon an alleged regulation. A regulation can not create a condition precedent. If it attempts to do so it adds to the law and is void.

The condition precedent could only be the fact itself, and not proof of that fact.

As we have shown, under the rules of contract the

right of the selector vests when he presents his relinquishment and written acceptance of the Government's standing offer, and this acceptance necessarily precedes, in the order of time, the filing of any affidavit or other papers. And, under the rules of contract, action by the local officers is not an element in the creation of the contract. If they should refuse to make the entry of record the rights of the selector would still be protected by the courts. See Duluth, etc., R'y *v.* Roy, 173 U. S., 590, where the rights of a settler who went to the local office and was told not to file his papers until a new survey should be made, was protected and given the title as against a patentee from the Government.

The filing of an affidavit is, therefore, in contemplation of law, an act subsequent in point of time to the creation of the contract, and failure to file the affidavit could not, in any view, destroy the contract.

That a regulation cannot create a condition precedent to title vesting is apparent when it is remembered that *the land department claims, and undoubtedly has, power in all cases to waive any regulation.* As said in Caledonia Mining Co., *v.* Rowen (2 L. D., 719, 720.

> "In Russell *v.* McLellan (3 W. & M., 157), where the mode of taking certain depositions departed from the rules of the court it was said: 'all our rules are open to such departures by leave of the court on good cause shown, *as all rules are established to facilitate and promote justice and not to embarrass and defeat it.*' In United States *v.* Breitling (20 How., 252) where a bill of exceptions was signed after the time limited by the rules of the court below, it is said: 'It is always in the power of the court to suspend its own rules, or to accept a particular case from their operation, whenever the purposes of justice require it.'"

And in Fierce *v.* McDougal, 11 L. D., 183, 184:

> "A rule of the department may always be waived in the interest of substantial justice, as rules are made to facilitate rather than to embarrass and defeat it."

And Bennett *v.* Cravens, 12 L. D., 647, 648:

> "In the exercise of your official discretion you waived the rule of practice in question, and considered said motion. The case was wholly within your jurisdiction, and it is not apparent that any injustice was the result of your action, or that said action was not within the limits of your discretionary power."

In the case at bar it is contended by the defendant that the rights of the selector did not attach at the time of selection because of failure to comply with an alleged regulation requiring the filing of an affidavit; yet, suppose the Department, in the exercise of its undoubted power, should waive the alleged regulation, at what time does the right attach? At the date of waiver? If so, the selector has done no further act and yet the rule is laid down by the defendant in this case that title vests *eo instanti* when the selector has done everything that he is required to do.

To say that title did not vest at the time of selection accordingly as the Department may or may not waive the regulation throws the matter in suspense, destroys law as the criterion and sets up in its place the discretion of the Department leaving the question to be decided, not upon any fixed legal principle, but according to the Department's varying idea of equity or propriety, and destroys the reciprocal relation of the parties and the finality required in all contracts.

It is often said that a valid regulation has the force of law, but this is not true, for, if it were, the Department, in waiving a regulation, would be suspending the operation of law.

As said in U. S. *v.* Eaton (144 U. S., 677); Caha *v.* U. S. (152 U. S., 211,) and re Kollock (165 U. S., 526):

> "Regulations prescribed by the President and by the heads of departments, *under authority granted by Congress*, may be regulations prescribed by law, *so as lawfully to support acts done under them and in accordance with them*, and may thus have in a proper sense the force of law."

A comparison of these three cases will show the narrow permissible scope of regulations. A regulation can bind the public only when Congress itself prescribes the requirements and expressly authorizes the executive officer to merely fill in details. Re Kollock, *supra*.

Even were the alleged regulation valid it amounts only to an approval of the practice of filing such an affidavit, or at most a direction to the local officers, and there is no intimation that failure to file the same with the form of selection will invalidate the transaction.

The defendant has realized the force of this proposition, for in his revised instructions, *supra*, he has inserted the following notice in Par. 26 (p. 376):

> "The action of the Register and Receiver in receiving a selection and making notation of the same upon their records will not in itself operate to confer any right upon the selector such as to prevent the subsequent rejection of the selection, where it is found that the selection as made was defective in any essential particular and for that reason should have been rejected."

In the administration of the land laws, proof of facts or conditions, even when required by express provision of statute, has been permitted to be filed afterward and relate back to the time of making entry.

Time can be of the essence of public land transactions only when it is made so expressly by statute or relates to matter of consideration for the entry or purchase.

The error of the defendant with respect to the alleged lack of non occupancy affidavit, resolves into his failure to observe the distinction between the contract of exchange and mere proof of a contemporaneous condition of fact upon which, according to his view of the statute, the validity of that contract depends, and his position is all the more remarkable in view of his sound ruling in Draper *v.* Wells, 25 L. D., 550 (1897), with respect to a *statutory requirement of proof*, where it is said, (p. 554)

> "The thing to be accomplished, the essence of the statutory requirement, is the development and improvement of the claim by the expenditure thereon of a stated amount in labor and improvements by the applicant or his grantors as a condition to patenting the claim. The proof thereof is required for the information and guidance of the government and not for the information or guidance of adverse parties. Differing from hte annual expenditure of one hundred dollars required by law, this five hundred dollar expenditure is not a condition to the maintenance of a mineral location. It is only a prerequisite to a patent, the obtaining of which is not necessary to the continued occupation and enjoyment of a mineral claim. The failure to make this five hundred dollar expenditure does not subject the claim to the acquisition of rights by others and much less would a failure to furnish proof of such expenditure to do so. The time of filing such proof does not affect the rights of others judicially or at all.

"Judge Cooley, in his Constitutional Limitations, (4th Ed., 93) says:

'Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.'

"In Sutherland on Statutory Construction it is said (section 447):

'Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it are exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental and comparatively unimportant particular.'

Applying this rule of construction to the provision fixing the time of filing of proof of this expenditure, it seems to clearly result that it is directory and not mandatory."

Even regarded abstractly the defendant's contention resolves into absurdity.

He holds that title did not vest because proof of non-occupancy was lacking, and attempts to justify his alleged regulation requiring a non-occupancy affidavit on the ground that the Department could not tell whether the land was occupied or not. Then, in the abstract, he rejects the selection for one of two reasons:

First. In the absence of the affidavit he presumes the land to be *occupied*, and, therefore, not subject to selection.

Second. In the absence of the affidavit he presumes the land to be *unoccupied* and subject to selection, but denies the selector the benefit of the selection, as the penalty of failing to comply with an alleged regulation requiring an affidavit confirming that presumption.

The first reason violates the rule of evidence and the practice of the Department as to the presumption in such cases. The second reason violates the principles of right and justice. There is no middle ground, for it has to be assumed that the land is or is not occupied, one or the other; it cannot be both, and it cannot be neither.

But here he admits that the land was unoccupied in fact, so that his action, in the concrete, falls under the second proposition and he is attempting to reject the selection solely by way of punishing the selector.

The absurdity of the defendant's contention, in the concrete, is also apparent from his decision in Porter *v.* Landrum, *supra*, where Porter made selection, on April 23, 1900, regular, according to the defendant's own views, in all respects except the filing of a non-occupancy affidavit. On August 20, 1900, four month's later, Landrum filed homestead entry for the same land. The defendant

says that if Landrum has been misled by the action of the local officers in accepting his entry and has settled upon the land, he will be fully protected. Yet, at the same time, he says that the lieu selection should not have been received by the local officers, and that Porter must lose the land, though deceived by the acceptance by the local officers of his relinquishment and approval by them of his selection, and notwithstanding the United States has his land and he cannot get it back, and notwithstanding Landrum had not settled on the selected land when the selection was made, and notwithstanding the land was then unoccupied in every sense.

And in *re* Cobb, *supra*, he held that it was the duty of the local officers to reject an imperfect selection upon presentation, and that "it was not incumbent upon them to invite the selector to present the requisite proofs and to await his action in that matter." Yet the Department had always previously held that an applicant shall not suffer through the error or inadvertence of the local officers (Carter *v.* Blunt, 17 L. D., 96, 99). And in 2 L. D., 260, the duty of the local officers to point out defects and allow immediate amendment was emphasized. See also Duluth, etc., R'y Co. *v.* Roy, 173 U. S., 590.

Even from the defendants stand point the object, of the affidavit has been accomplished.

In the instructions of February 19, 1902, (31 L. D., 251) the defendant held that the requirement in his previous instructions under the act of 1897 that the non-mineral affidavit should state whether the land is within six miles of any mining claim, was not a condition necessary to the completion of the selection and that where publication had been had the reason for the requirement no longer existed.

Reason being the criterion, the purpose of a non-occupancy affidavit has likewise been subserved, for the defendant admits that there was no occupation of the land and that there is no adverse interest

Again if it be suggested that the purpose of requiring the non-occupancy affidavit was to protect mineral locators or settlers, that purpose was subserved, in the abstract, by publication of notice of the selection, imposed upon the selector in the face of the statutory direction that he be put to no expense, and by delaying the issuing of patent for three months to give any settler opportunity to tender application to enter the land within the statutory period of three months after settlement. See Circular (L. D.) par.

Again the selector could not be presumed to know which portion of the so-called regulation was intended to be directory and which mandatory, and it would certainly seem that if any portion were intended to be mandatory it would be that printed in the regulation itself, and not a mere recital in a form never printed in any published Instruction.

Again, the certificate of the local officers supplied every purpose of an affidavit. See Bohun *v.* Brest, (24 L. D., 16).

XI.

The Land Department itself, in not enforcing the alleged regulation, even had the same been valid, had established a rule of administration under which the selector made his selections and in any event cannot legally apply a different rule retroactively to defeat those selections.

It is admitted in the pleadings that this alleged regulation had never been enforced before the defendant attempted to apply it to defeat the selections in the case at bar, and that dozens of cases had been passed to patent without any accompanying non-occupancy affidavit. The selections here were made in the manner approved by such then existing practice and no suggestion of the necessity of any further affidavit was made by the local officers or the Commissioner of the General Land Office.

Under the familiar rules, applying to changes in the interpretation of statutes and the established rules of the Land Department, such a change in the practice of Land Department could operate only prospectively.

Savings Bank *v.* County of Franklin, 128 U. S., 526, and cases cited.
Minor *v.* Marriott, 2 L. D., 711.
Gowdy *v.* Kismet Gold M. Co., 24 L. D., 191.

See also, 8 L. D., 109; 6 L. D., 217; 7 L. D., 75; 8 L. D., 399; 6 L. D., 145; 6 L. D., 225; 5 L. D., 167; 5 L. D., 261; 5 L. D., 380; 9 L. D., 86; 9 L. D., 189; 9 L. D., 284; 9 L. D., 359; 10 L. D., 654; 22 L. D., 675.

If the defendant's action here could be sustained, all of the patents so previously issued are void and it would be his duty to cause suits to cancel them to be instituted; but it is needless to suggest that no court would seriously consider such a proposition.

XI.

The requirement of a non-occupancy affidavit, if supportable,

The requirement of a non-occupancy affidavit, if supportable, and if not satisfied by the affidavits accompanying the selections was waived by the local officers in accepting the selections without demanding or requiring a further affidavit.

Bearing in mind that the Government stands in no better plight than an individual with respect to contractual relations, and applying the legal rules of contract, it will be seen that after the consideration has passed the vendor is estopped from setting up any such objection to giving the deed of conveyance as the defendant relies upon. He would not be permitted to plead oversight on his part or the part of his agent. The land being admittedly *vacant land open to settlement*, any court would say: "You have exchanged exactly what you offered to exchange and if you had any right to demand proof you should have demanded it before you closed the deal and took the consideration. You have the other man's land and it shocks the moral sense to suggest that you want to back out. Even if you could show that the land was not 'vacant land open to settlement,' within the terms of your contract, and could make that defense, of what consequence would a false affidavit be? And if the land was 'vacant land open to settlement,' what possible injury can you have suffered by closing the deal without calling for proof of that fact?"

So that every view leads ultimately to the fundamental truth that even under the defendant's attempted construction of the act it is the *fact* and not the *proof* that is the essence of the transaction.

The local officers in the exercise of their primary powers, accepted the selections and affidavits tendered therewith, and certified the case for patent. In failing to require a further affidavit the alleged regulation was vio-

lated by them, if at all, and not by the selector.

This very question was before the Supreme Court of Mississippi in Carter *v.* Spencer, 4 How., (Miss.), where that court said:

> "Under this act (April 15, 1832), the Secretary prescribed rules and regulations by which the individuals claiming under it should be governed. The claimant was required to make proof by his own affidavit, supported by the affidavit of a disinterested person, that he was an actual housekeeper on the land. Another rule was that the right conferred by the act was not to interfere with public sales or private entries. And in order to prevent confusion, an applicant for private entry was required to swear that the land designed to be entered was not subject to the right of preemption. In the violation of this last provision, it is said that the fraud was perpetrated * * * It is alleged in the bill that Spencer entered without making this affidavit. This is admitted by the answer, which avers also that no such affidavit was required of him by the register, in addition to which the entry without it is evidence that it was dispensed with by the register * * * It was a mere instruction which required the affidavit. The law did not require it. * * * But if the instruction was violated, it was done by the register, not by Spencer."

And it is worthy of note that the regulation mentioned in that case, being violative of the rule of evidence that corroborative testimony cannot be required to supplement a *prima facia* case, as announced by Attorney General Butler, (3 Op., 126), was afterwards revoked and no such affidavit has been required of a cash applicant for many years.

And in dealing with a similar question, differing in

the fundamental feature however, that the requirement was one of *statutory provision*, the Supreme Court, in United States *v.* Morant, 123 U. S., 335, 343, say:

> "The failure to annex a sworn copy of the government surveys to the petition is not a question of jurisdiction, but a matter relating merely to the form of procedure, which should have been objected to when the pleadings were *in fieri*, and the petitioners could have obtained leave to amend."

In Hawkeye Placer *v.* Gray Eagle Placer, (15 L. D., 45, 47), it was held:

> "The non-compliance in this case was with the requirement of a rule and should not be so strictly followed as to require an impossibility or to *work an injustice*."

And in Brown *et. al. v.* Bond, *et. al.*, (11 L. D., 150, 154), the Department said:

> "While the Secretary of the Interior has the power to establish rules and regulations to give effect to the provisions of the act which have all the force and effect of law, if not in contravention of it, yet the failure to comply with the technical requirements of the rules and regulations was a mere irregularity, and will not defeat the right the claimant to have the controversy settled by the appropriate tribunal if he has complied with the *statute*."

Again, all contracts, and relations growing out of them, must be *reciprocal*. If the selector in this case desired to withdraw his selection upon the ground that he had not filed a non-occupancy proof, and that, therefore, the contract was incomplete, is there any principle of law or equity that would permit him to do so? Would not the

Department and the Court say to him as was said in *re* Stimson, *supra*, and *re* Hyde, (31 L. D., 28), that his affidavit was not the only means of determining the character of the land, and that if the Government found the land to be "vacant land open to settlement" it could hold him to his contract?

If the Government can hold the selector to the contract, it necessarily follows that the selector can hold the Government.

In conclusion, we again suggest that the case presents the single and simple question of the power of the defendant to refuse patent upon the pretext that a non-occupancy affidavit was not filed, when he admits that the land when purchased was in fact unoccupied. We submit, as we said before, that the mere statement of the proposition demonstrates its absurdity and renders a consideration of the many matters treated of herein wholly academic. But, in view of the magnitude of the interests involved and the pendency of other cases, we have deemed it proper to present every aspect of the case.

Respectfully submitted,

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APPENDIX A.

Petroleum is not Mineral, Petroleum Lands are not Reserved From Purchase Entry Under the General Laws, and Under the Act of February 11, 1897, no Rights Attach Until Entry.

The Origin and Nature of Petroleum.

According to the prevailing scientific opinion petroleum is of organic origin—a product of the decomposition of fish and other aquatic animals.

All of the theories and opinions of the writers on the subject will be found collected and reviewed in Brannt's Petroleum, its History, Origin, Occurrence and Production. In view of the exhaustive treatment of the subject to be found there, it seems unnecessary to cite particular authorities here. We find, however, a recent article by the geologist of the State of Maryland on the reported discoveries of oil in this section, published in the Baltimore Sun, in which he states that the prevailing opinion as to the origin of petroleum is as we have stated above.

Originally, when its nature and origin were not so well understood, petroleum was known as "rock oil," and while it is yet popularly termed a mineral oil and has been so termed by some of the courts—even the Supreme Court of the United States—in cases where its classification as a substance or the application of the public land laws was not involved, it is apparent that such terminology has been used, for want of a better descriptive term, to distinguish it from the artificial oils popularly classed as animal and vegetable.

That the term mineral is not used as signifying *inorganic* origin is apparent from its use in scientific works where, at the same time, petroleum is said to be of *organic* origin. See, for instance, Fowne's Manual of Elementary Chemistry (1862) pages 540–541, where will be found a treatment of the subject in the light of the then existing knowledge of the substance.

Petroleum belongs in the Same Category as Water.

The Supreme Court in Ohio Oil Company *vs.* Indiana, 177 U. S. 190, has demonstrated the wide and unbridgeable distinction between liquid substances, irrespective of their chemical or physical classification, and the mineral substances contemplated by the mining laws and the reservation of minerals from sale or entry under the other land laws. The opinion of the court is too lengthy to make satisfactory quotation within the limits of this brief; but an examination of the case will show that the court places oil in the same category as water and holds that it is governed by the rules of law applying to water and not by the principles applicable to other mineral deposits and that (syllabus):

> "the owner of the surface has no property right in the gas or oil until he has actually reduced it to possession, or if he has any property right therein, it is a right in common with the co-equal right of other land owners to take from the common source of supply."

And in the previous case of Brown *vs.* Spilman (155 U. S. 665), it was said:

> "Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining for coal and other minerals *which have a fixed situs* can not be applied to contracts concerning them without some qualifications."

Lands Valuable for Petroleum are Not Mineral Lands.

The reservations of mineral lands in the public land laws were made before the discovery of petroleum deposits in this country, and if there is one thing clear from the letter and policy of the national mining laws it is that the substances contemplated there are such as have a fixed *situs* and a review of the legislation upon the subject will show that the substances contemplated by Congress as included within the term mineral (with the exception of coal, which is elsewhere specifically mentioned), are the metals and especially the precious metals.

A full history of the subject will be found in The Public Domain, 1883, pp. 306–331.

Up to 1848 copper, lead and iron were the only minerals which were contemplated by the reservations in the several laws, although gold and silver had been, through abundance of caution, reserved in the ordinance of 1785.

In 1850 the Attorney General held that public lands containing *iron ore merely* were not *mineral* within the act of 1847 for the sale of "copper, lead or *other valuable ores*" in the Lake Superior district, but were to be disposed of under the other laws.

In Mullan *vs.* U. S., 118 U. S. 271, the court recognized that it was doubtful if *coal* was *mineral* within the meaning of the reservation in the pre-emption act of 1841 and only resolved that doubt by the aid of a subsequent statute expressly declaring coal to be so reserved. They say:

> "The case, therefore, turns on the question whether coal lands are mineral lands within the meaning of that term as used in the statute regulating the disposition of the public domain.
>
> "The first statute which made any reference to minerals on the public lands was that of September 4, 1841, 5 Stat. at L. 453, Chap. 16, Sec. 10, which

provided that no pre-emption entry should be made on lands on which are situated any known salines or mines; and by the act of July 1, 1864, 13 Stat. at L. 343, Chap. 205, Sec. 1, it was provided that, '*Any tracts embracing coal beds or coal fields* constituting portions of the public domain, *and which as 'mines are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry,'* might be disposed of at a price not less than twenty dollars an acre. This is clearly a legislative declaration that 'known' coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested. *Whatever doubt there may be as to the effect of this declaration on past transactions,* it is clear that after it was made coal lands were to be treated as mineral lands."

The discovery of gold in California and the rush of miners into that section induced the passage of the act of 1866 countenancing and regulating mining upon the public domain for individual profit and permitting entry and patenting of lode claims, followed by the act of 1872 amending the act of 1866 so as to permit the entry and patenting of placer claims, and the act of 1872 amending the previous acts. As incorporated in the Revised Statutes, the previous laws are found in Secs. 2318 et seq.:

R. S. 2318 reserves from sale, except as otherwise expressly directed by law, all lands valuable for *minerals.*"

By R. S. 2319, "all valuable mineral deposits in lands belonging to the United States," are declared open to exploration and purchase.

R. S. 2320 regulates mining claims upon "veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits."

And R. S. 2329 provides for the entry and patenting of

"claims usually called 'placers,' including all forms of deposit excepting veins of quartz or other rock in place."

In view of the familiar rule of interpretation limiting general terms to intend things of the same kind as those particularized, and especially in view of the opinion of the Attorney General, *supra*, it must be presumed that the general term "other valuable deposits," intends substances of the same mineral character as the particular substances specified, viz., gold, silver, cinnabar, lead, tin and copper.

And the term mineral being thus limited to metallic ores (with the addition of coal by express statute) we have a safe and certain classification.

None of the Federal courts have been called upon to determine the meaning and scope of the terms "valuable mineral deposits," "other valuable deposits," or "claims usually called placers including all forms of deposit." But the Supreme Court has, in two cases, defined lode and placer claims in language that leaves no room for doubt as to the understanding of that court with respect to the meaning of the terms "mineral," or "other valuable deposits."

In Reynolds *vs.* Mining Co., 116 U. S. 687, they say:

> "These varying provisions of the act of Congress as regards the two classes of mineral deposits and their surroundings are founded on the well known differences in their character. The veins, lodes or fissures mentioned in section 2320 are found in the surrounding rock, and are described and defined in the case of Iron Silver Co. *vs.* Cheesman, recently decided in this court. Placer mines, though said by the statute to include all other deposits of mineral matter, are those in which this mineral is generally found in the softer material which covers the earth's surface, and not among the rocks beneath. The one is only made available by following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface, and subjecting it to crushing, melting and other processes by which the precious metal is separated from the ore of which it is a part.

> In the other, the more usual way is take the soft earthy matter in which particles of mineral are loosely mingled and by filtration separate the one from the other. It is very clear that Congress considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit; and it accordingly, when a patent was asked, fixed the price of the former at $5, and of the latter at $2.50 per acre, as represented by the superficial area of the survey."

And in United States *vs.* Silver Mining Co., 128 U. S. 679, they say:

> "By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is not fixed in rock, but which are in a loose state and may, in most cases, be collected by washing or amalgamation without milling.
>
> "By 'veins or lodes,' as here used, are meant lines or aggregations of metal embedded in quartz or other rock in place. The terms are found together in the statute, and both are intended to indicate the presence of metal in rock. . . . In Iron Silver Mining Company *vs.* Cheesman, 116 U. S. 533, a definition of a lode is given, so far as it is practicable to define it with accuracy, and it is not necessary to repeat it."

And an examination of the many decisions of the Supreme Court, particularly the opinions of Mr. Justice Field, the great mentor of the mineral law, will show that in speaking of the minerals contemplated by the public land laws they habitually use the term "precious metals."

See—

Buford *vs.* Houtz, 133 U. S. 320.
Forbes *vs.* Gracey, 94 U. S. 762.
Mining Co. *vs.* Mining Co., 143 U. S. 394.
Jennison *vs.* Kirk, 98 U. S. 457.
Erhardt *vs.* Boaro, 113 U. S. 527.
Iron Silver Mining Co. *vs.* Cheesman, 116 U. S. 529.
Sullivan *vs.* Mining Co., 143 U. S. 434.

And later legislation leaves no room for doubt as to the intent of Congress.

By the act of June 3, 1878 (20 St. 89), known as the Timber and Stone Act, Congress provided that land valuable chiefly for timber or stone might be sold, expressly reserving lands containing gold, silver, cinnabar, copper, or coal.

The Land Department regarded this act as not reserving such lands from entry under the general land laws; and on January 2, 1891, in Conlin *vs.* Kelly, 12 L. D. 1, held that building stone was not mineral, and did not render land containing it subject to appropriation under the mining laws, or except it from pre-emption entry, citing the act of 1878 as confirming this position, and adopting the definition of placers contained in Monax *vs.* Wilkinson, 2 Mont. 42, viz.: "Placers are superficial deposits which occupy the beds of ancient rivers or valleys."

The following year Congress passed the act of August 4, 1892 (27 Stat. 348) entitled—

> "An act to authorize the *entry* of lands chiefly valuable for building stone under the placer mining laws."

And providing—

> "That any person authorized to *enter* lands under the mining laws of the United States may *enter* lands that are chiefly valuable for building stone, under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools, or donated to any State, shall not be subject to entry under this act."

And also extending the act of 1878 to all the public land States.

It will be observed that in this act of 1892, there is no declaration that stone is to be regarded as mineral and no reservation of lands containing stone from sale or entry under other laws. Accordingly on October 12, 1892, the

land department issued a circular under this act (15 L. D. 360), saying:

> "It is not the understanding of this office that the first section of said act of August 4, 1892, withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto."

This was followed by the decision of February 13, 1892, in Clark *vs.* Ervin (16 L. D. 122) where the department held that land chiefly valuable for building stone was not, before the act of 1892, subject to placer entry or reserved from entry under the homestead and pre-emption laws; the decision of March 3, 1893, in South Dakota *vs.* Vermont Stone Company (16 L. D. 263) holding that lands chiefly valuable for building stone are not excepted as "mineral lands" from the grant to the State for school purposes; the decision of June 21, 1893, in Hayden *vs.* Jamison (16 L. D. 537), reversing the previous ruling in same case in 15 L. D. 276, and holding that land containing building stone is not excluded from agricultural entry, and that a homestead entry, though made for the purpose of securing the stone, is not of necessity made in bad faith; the decision of July 24, 1893, in re Delaney (17 L. D. 120), holding that a placer location prior to act of 1892 is not a legal appropriation of the land, and an intervening homestead entry will defeat the right of the placer claimant to perfect his claim under said act; the decision of December 19, 1894, in Clark *vs.* Ervin, on review (17 L. D. 550), holding that a placer location of land for building stone that fails, because unwarranted under the law when made, can not be validated by a subsequent discovery of some other material that is subject to entry under the placer law.

On August 27, 1896, Secretary Smith, in a well-considered decision in the case of the Union Oil Company (23 L. D. 222), held that petroleum is not a mineral within the meaning of the land laws.

Two days later Secretary Smith promulgated instructions

under the act of 1892, *supra* (23 L. D. 322), from which we quote:

> "By the timber and stone act of June 3, 1878 (20 Stat. 89), Congress provided for the disposition of the public lands chiefly valuable for timber or stone and unfit for cultivation. There can be no doubt but what land chiefly valuable for building stone could have been purchased under said act, if the appellant could have shown himself qualified, and shown that the land was unfit for cultivation and otherwise in such condition as to bring it within the purview of the act. Congress in passing the act of 1892 was directly dealing with the subject of the act of 1878; the second section of the act of 1892 extended the act of 1878 to the public land States. The language used in section 1 of the act of 1892 fails to show, either expressly or by implication, that Congress intended to repeal any part of the act of 1878. It is equally clear that Congress did not intend by said section for all purposes to place lands chiefly valuable for building stone in the same category as lands containing such minerals as gold, silver, cinnabar, copper, and the like. Lands valuable for such minerals are expressly reserved from sale except as otherwise expressly directed by law (Revised Statutes, Sec. 2318), and there is nothing in the section under consideration to show that Congress intended to place building stone on the same general plane with gold, silver, and other minerals. In other words, said section neither takes building stone out of the act of 1878, nor does it add such land to such as contain minerals. It in no way affects the status of land containing building stone. It simply opens up an additional and a new avenue whereby properly qualified persons may acquire title to such lands as contain this particular kind of stone, by permitting such lands to be entered under the placer mining law. The language used is:
>
> "That any person authorized to enter under lands the mining laws . . . may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.

"It is not material to inquire for, or ascertain the reasons Congress may have had for extending to these persons the right to *make entry* of building stone lands under the placer mining laws. It is sufficient to know the extension has been made in clear, explicit language. It is equally clear that the extension is limited to the right to "enter" such lands. The language used shows that the right so given can only attach by the *entry*. Under the mineral laws a discovery and a location are both necessary, and in cases where title is sought they both must precede the entry. Mineral claimants who conform to the laws and regulations are protected in their possessory rights to their claims, whether they seek to make entry or not, so long as they comply with the law and regulations. The matter of entry is left optional with them. They secure their rights by discovery, location, performance of the required amount of labor on their claims. Under section 1 of the act under consideration a claimant for lands chiefly valuable for building stone can only secure a right to the land by making an *entry* thereof and the payment of the government price of the land.

"It follows that, in order to the exercise of the right of entry under section 1 of the act under consideration, and preceding the entry, a discovery will be necessary, and no right will attach in favor of the entryman until he makes an application to enter, describing it by legal subdivisions if on surveyed land.

"It does not follow that because the mere right of entry under the placer laws is extended to claimants of lands that are chiefly valuable for building stone, that such claimant is thereby invested with all the rights of claimants under the mineral laws. The building stone claimant is only invested with such rights as the statute gives to him, which can only become vested at the time he makes entry."

And on October 5, 1896 (23 L. D. 328), it was again held that prior to the passage of the act of 1892 there was no authority to locate and purchase lands valuable for building stone under the placer mining laws, and that under the pro-

visions of section 1 of that act no rights are secured prior to entry.

And thereupon Congress, as it had done with reference to stone, and with the departmental interpretation and administration of the act of 1892, *supra*, before it, passed the act of February 11, 1897 (29 St. 526), entitled:

> "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States."

And providing—

> "That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof."

And thereupon the Land Department issued a circular under this act (24 L. D. 183, 184), in which it said:

> "It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.
>
> "Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are

> by said act expressly confirmed, but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws."

And on May 5, 1897, in Hayden vs. Jamison (24 L. D. 463), the department again held that no right attaches in favor of a placer claimant under the act of 1892 until he makes application to enter.

From the foregoing considerations two propositions are clear—

First. **The act of 1897 is a legislative recognition that petroleum is not mineral within the meaning of the land laws.**

As we have shown, this was the understanding of the land department at the time of its passage and as said by the Supreme Court in Midway Co. vs. Eaton (183 U. S. 692):

> "It is natural to respect the rulings of the Land Department upon any statute affecting the public domain, and if the rulings were contemporaneous with the enactment of the statute they afford a somewhat confident presumption of its meaning. *One of the reasons is that the Land Department may have recommended the statute—indeed may have written its words*, or, at any rate, were familiar with the circumstances which induced the legislation."

And when Congress, in the act of 1897, adopted the form and language of the act of 1892, in the light of its then uniform interpretation and administration by the Land Department, it is beyond question that the later act was intended to have the same meaning and application which had been given the former.

It is to be observed that in the act of 1897 there is no reservation of petroleum lands from entry under the general laws, and, as the Land Department properly held with respect to both statutes, this act merely provided an additional

method of acquiring title to petroleum lands, the reason of which is apparent when it is remembered that when the act was passed, the homestead law was the only general law by which title to non-mineral land could be acquired, and that law required residence and cultivation for five years, and limited a person to one entry.

When it is remembered that the price of placer ground is only $2.50 per acre, while no price is put upon the non-mineral lands of the public domain, and scrip which can be located upon such land sells for $4 or $5 per acre, it is apparent that there could be no public policy demanding the reservation of petroleum lands from settlement or from the operation of the forest reserve land exchange act of June 4, 1897, and that the Government, in exchanging even known petroleum lands at $2.50 per acre for land in its forest reserves of much greater value, would be striking a good bargain.

Second. No rights attach under the act of February 11, 1897, until application to enter.

The same considerations also apply here. The Land Department, as we have shown, had uniformly administered the building stone act of 1892 as giving no right in such land until application to enter and contemporaneously interpreted the act of 1897 in the same way; and, in view of the familiar rules of interpretation and the pertinent language of the Supreme Court in Midway Co. *vs.* Eaton, *supra*, there can be no doubt as to the soundness of our second proposition.

Furthermore the Supreme Court has declared the term "enter" or "entry" to mean the "filing of a claim with the register of the local land office." Chouteau *vs.* Pope (12 Wheaton, 587). See also Wisconsin Railroad Co. *vs.* Price (133 U. S. 497).

And when Congress has intended to extend the provisions of the mining laws generally to a subject to which

they were not previously applicable it has used apt language. By the act of January 12, 1877, (19 St. 221) saline lands, which, with mineral lands, had theretofore been reserved from sale under the general laws, were directed to be offered at public sale under certain conditions; but on January 31, 1901, Congress passed an act (31 St. 745), entitled "An act *extending the mining laws to saline lands*," and providing:

> "That all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to *location* and purchase under the provisions of the law relating to placer mining claims: *Provided*, That the same person shall not *locate* or *enter* more than one claim thereunder."

Thus authorizing the location of claims on saline lands instead of merely authorizing entry at the local land office, as in the case of stone and petroleum. In the one case possession may be maintained and the salt extracted without entry and payment to the Government of the price of the land, while in the other the Government requires that applicants shall purchase the land itself and pay the Government price for it.

We might also refer to the act of March 3, 1891 (26 Stat. 1095), where, in legislating for Alaska, it is provided, in section 14, that the two preceding sections shall not be construed to warrant the sale of lands which shall contain "coal or the precious metals," and, in section 15, that townsite entries shall not carry title to any vein of gold, silver, cinnabar, copper or lead.

And the act of May 14, 1898 (30 Stat. 409, Sec. 2), which provided that nothing in that act should be construed to give the railroad company the ownership or use of "minerals, including coal," and in section 10 used the term "mineral or coal lands."

And the act of July 1, 1898 (30 Stat. 620), used the

expression "not mineral or reserved and not valuable for stone, iron or coal."

The Rulings of the Present Administration of the Land Department.

In view of all these considerations, the rulings of the present administration of the Land Department attempting to reverse the contemporaneous departmental interpretation of the acts of 1892 and 1897 and adopting the formula that mineral includes every substance which may make land more valuable for its extraction than for agricultural purposes, and holding that the act of 1897 is a legislative declaration that petroleum is mineral within the meaning of the mining laws, are such manifestly strained constructions of the several laws, unwarranted by their terms and by the spirit and intent of their enactment, as to be unworthy of notice. Even the present administration has found its attempted criterion of mineral character too broad and far-reaching to suit itself, and has felt compelled in King *vs.* Bradford (31 L. D. 466; Oct. 10, 1901), to hold that lands containing deposits of ordinary brick are not mineral lands within the meaning of the mining laws, though more valuable for such deposits than for agricultural purposes; thus demolishing its own formula and demonstrating the absurdity of venturing beyond the safe rule of limiting mineral, as plainly intended by the statutes, to include the ores or metals and coal, obtained by mining in the proper sense.

Respectfully submitted,

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